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JOINT APPENDIX

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, et al.,

Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, et al.,

Respondents.

No. 78-119

STATE OF WASHINGTON, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

PETITIONS FOR WRITS OF CERTIORARI FILED
January 9, 1978, July 21, 1978 and July 24, 1978
CERTIORARI GRANTED OCTOBER 16, 1978

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,

Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION and WASHINGTON KELPERS ASSOCIATION,

Respondents.

AND

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,

Petitioners,

v.

PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,

Respondents.

No. 78-119

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES, and DONALD W. MOOS, Its Director,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors-Respondents.

AND

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,

Respondents.

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

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Testimony in Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson [89 Wn.2d 276 (1977)]

Thor Tollefson (Director, Fisheries — October 10, 1974):

Q. As a result of the Boldt Decision, Mr. Director, what action did you take in meeting the obligations of complying with the decision and order?

A. The first action we took had to do with the ocean fishery. It was in two parts. We reduced the daily bag limit of salmon from three fish to two and then we closed the three mile strip off our coastal commercial fishing.

Q. Those are regulatory enactments that you did in fact take, is that correct, as a result of the Boldt Decision?

A. That is correct. We followed the Washington Administrative Procedures Act.

(p. 1-13, line 24—p. 1-14, line 6)

Q. Director, what were the factors that you had in mind in adopting the regulatory enactments that we are concerned with in this proceeding, namely, the three to two closure and the three mile strip closure? What were the factors or what were you addressing yourself to in passing the regulations?

A. A very simple one. We were under injunction by Judge Boldt to significantly reduce non-Indian fishing in order to make more fish available to the Indians so they would have an opportunity to catch more.

(p. 1-23, lines 12-22)

Q. Would it also be a fair statement of the chinook and coho destined for the Puget Sound area that 50 per cent of the fish are caught by the Canadian troll fishery or more?

A. Yes, Canadians get off the west coast of Vancouver Island a mile and a quarter for coho, a little more this year, and three quarters of a mile for chinook.

Q. Is it your concept that Judge Boldt in his decision should control the Canadian fishery?

A. I am sorry.

Q. Is it your concept Judge Boldt in his decision allocating the number of fish in his decision does control Canadian fishery?

A. That is unclear to me. He did say that the Indians must abide by the Salmon Commission regulations. Under the Salmon Commission regulations, there is no possible way the Indians could harvest 50 percent of the United States share of those fish. But to specifically answer your question, it is a legal question that is unresolved as far as I know.

Q. Let me ask it this way. Were the Canadian troll fisheries controlled in any way or reduced in any way by Judge Boldt's decision this year?

A. No.

(p. 1-52, line 8—p. 1-53, line 1)

Q. What I am asking is if the Indians cannot catch 50 per cent of the fish, is it necessary to insure they can catch 50 per cent to prohibit commercial trolling within three miles of shore on the information available to you in your capacity?

A. There is no prohibition against their trolling in the three mile limit.

Q. I believe you passed a regulation.

A. Then we were enjoined.

Q. That is what we are here about today. If the Indians are not capable of catching 50 per cent of the fish, is it necessary for you to make a rule which prohibits commercial trolling within three miles of shore?

A. I can't answer that until I know what the Indian catch is.

Q. You are the highest official of the State of Washington. The buck stops with you. The information available to you is the Indians can't?

A. I don't think they have the capability of catching 50 per cent. I said that. But we provided them with the opportunity. That is our guideline.

(p. 1-58, line 30—p. 1-59, line 2)

Q. Will you agree with me that the small boat commercial troll industry has been economically hurt as a result of the regulation which prohibits them from fishing within the territorial waters of the State of Washington?

A. Yes, they have been hurt.

Q. I came up with the word "devastating" last Friday and you agreed.

A. I don't think I agreed with the word "devastating". All the non-Indian fisheries have been seriously damaged.

(p. 1-60, lines 9-18)

Q. My question used the word "include." You interpreted the Judge Boldt Decision as requiring you to make 50 per cent of the artificially spawned salmon available, too?

A. All fish, yes.

THE COURT: Before we leave the subject, I don't mean to insert myself in the litigation, I would like to have you ask the definition of "artificially spawned salmon."

Q. (By Mr. Bean) Will you please define "artificially spawned salmon?"

A. Salmon spawned in hatcheries and in artificial spawning channels.

Q. Under control of the department?

A. Under control of the Department of Fisheries.

THE COURT: In hatcheries?

THE WITNESS: And in artificial spawning channels.

THE COURT: Thank you.

Q. (By Mr. Bean) These artificially spawning projects, these are done under your supervision?

A. Yes.

Q. Who funds these?

A. We get money from the general fund, state appropriations, plus mitigation money from power companies that build dams, and we get some federal money under Public Law 88309 and 89304 for anadromous fish enhancement programs.

(p. 1-71, lines 1-28)

Q. Do you know how many licensed commercial trollers there are in the state? Do you know that?

A. Not off the top of my head. Somewhere in the neighborhood of 3,000, I would guess.

(p. 1-74, lines 25-29)

Dell Fender, Fisherman (second day):

A. My name is Dell Fender. I live in Westport, Washington, Post Office Box 432, F-E-N-D-E-R.

Q. What is your occupation, sir?

A. I am the owner of Salmon Charters, Inc., charter office, restaurant, and we do business or make reservations and charter service for 19 boats.

Q. How long have you been in the Westport area and charter business?

A. Over 20 years.

(p. 2-90, lines 5-13)

Q. Can you describe how a charter office works with respect to the 19 boats that are in your responsibility?

A. Well, mainly it is the more economical way for a small businessman to operate. He pools his resources and then all advertise as a group. You can get more

advertising out for 14 boats than you can for 5 or 6 because you have a larger sum of money to do it with. You can cover a larger area and also better service customers by having more boats than a few boats.

Q. With respect to your relationship to the people in your group, how do they compensate you?

A. We get a percentage of the gross for the charter fee for operational expense.

(p. 2-91, lines 14-26)

Q. Tell us, based upon the 20 years you have had in business and your experience of running the charter office, what impact the two fish limit would have had if it had been in effect the entire year this year?

A. When the public announcement came out the fish limit was cut to two fish on June 15, we had two cancellations for every one reservation we received.

Q. Was that attibutable solely to the two fish limit?

A. This is their excuse.

Q. If the two fish limit had continued in effect through the entire season, how would your business have fared with that problem?

A. If it would have declined the same percentage for the total season it did for the two weeks after June 15, I would hate tho think what it would be. It would be disastrous.

Q. What was the percentage of decline?

A. Over a third.

Q. Over a third. I think it shows the decline for the two weeks after June 15th —

A. Actually, our season starts picking up. We do real good in May, but in June it starts to load out. By the middle of a normal June we are usually booked pretty solid from there on through July and August.

Q. I see in July your figures on Exhibit 5 reflect the total

month of July being down 893 passengers as compared with the previous year.

A. Yes.

Q. To what do you attribute that decline?

A. Solely to the two fish limit.

Q. Why do you have that opinion?

A. This is what the people told us when they called up and cancelled out or in their letters they wrote cancelling reservations.

(p. 2-92, line 16—p. 2-93, line 19)

Robert W. Allen, Operator, Deep Sea Charters (second day):

A. Robert W. Allen, Westhaven Drive, Westport.

Q. What is your occupation, sir?

A. Charter office.

Q. Where do you operate?

A. In Westport.

Q. How long have you been in the charter business?

A. Since 1968.

Q. What is the name of your charter office?

A. Deep Sea Charters.

Q. How many boats operate out of your office?

A. Ten this year.

Q. Can you give us some idea of the investment you have in your charter operation?

A. Around $100,000.

Q. Of the boats that fish in your fleet of 10 boats, what sort of investment does that represent?

A. I would guess a quarter of a million dollars.

(p. 2-101, line 29—p. 2-102, line 15)

Q. What do your figures show with respect to the July number of passengers for 1974 as compared with the prior year?

A. Well, in July of '73 we hauled 3,071 passengers and in July of '74 we had 1,187, a decrease of 1,184.

Q. Mr. Allen, can you tell us what your understanding is of the reason why you experienced the decline in the second and third weeks of June and the very drastic decline in July of 1974?

A. Definitely the two fish limit.

Q. Why do you say that?

A. My customers told me.

Q. Are you the person who takes many of the reservations, talks with the customers?

A. The biggest share of them.

Q. Why did they say they wouldn't fish if they could catch two fish as compared with three fish?

A. They felt the investment of the trip wasn't worth it. Most of them realized that lots of times they don't get their limit, but they felt if they come down one time and get skunked, they should have a chance to get even with three fish the next time.

Q. Do you have an opinion, then, as to what the effect would be, or would have been this year, if the two fish limit had been in effect the whole year?

A. I think it would have been awful bad.

Q. Would you have been able to continue in business?

A. I don't think so.

(p. 2-103, line 7—p. 2-104, line 4)

Al Nyhus, Jr. (second day):

A. Al Nyhus, Jr., N-Y-H-U-S, P. O. Box 351, Westport.

Q. And your occupation, sir?

A. I am a charter boat owner-operator and partner in a charter office.

Q. What is the name of the office?
A. Gull Charters, Inc.
Q. They are in Westport?
A. Yes.
Q. I take it you are a member of the Westport Association, as are all the other officers who are in Westport?
A. Yes, we are.
Q. How many boats do you have in your charter office?
A. We have nine.
Q. Would you describe your boat, please?
A. Well, I presently built a new boat last winter and it is 56 feet long. It will acccommodate up to 22 passengers and it was also built for salmon fishing and also to try to take advantage of the tuna fishing industry which seems to be coming along.
Q. What is represented by your investment?
A. I have presently invested in my vessel in excess of $100,000.

(p. 2-108, line 30—p. 2-109, line 21)

Q. Do you have an opinion what might happen if the two fish limit were to be continued or were to be in effect the next season, the 1975 season?
A. I can't see any reason we shouldn't see the same decline we did, say, the 15th of June this year. Why should it be any different?
Q. If it were to reach the point where you can no longer financially continue in business, what would the marketability be of your boat and other boats equipped to do the charter fishing?
A. Well, if the charter business were to fall to that level, the market for that type of boat would be nil. The only way I could sell the boat for some other type of venture would be through extensive alterations to make it suitable for some other type, say a cruiser or a

commercial vessel which would be quite expensive, almost prohibitive. These vessels are built especially for this type of service, and to make extensive alterations would be quite expensive.

(p. 2-112, lines 6-24)

Charles Romaine, Motel Operator (second day):

A. Charles Romaine, R-O-M-A-I-N-E.
Q. Your address?
A. Post Office Box 558, Long Beach, Washington.
Q. Mr. Romaine, what is your business?
A. Motel business.
Q. Describe your motel and its location?
A. I have 120 unit motel at Long Beach, Washington, three miles from Ilwaco. It is a recreational type motel.

(p. 2-136, lines 23-30)

Q. To what extent is your motel operation dependent upon the charter business?
A. I would say 50 per cent.
Q. All right, if the charter business were not in operation in Ilwaco, what effect would that have on your ability to function as an operator?
A. We would be down, of course, 50 per cent of our net.
Q. What would that do to your operation? Would you continue to have your debt service taken care of?
A. I am afraid not.
Q. You would be out of business, would you not?
A. It would seem that way.
Q. Will you tell the Court, please, what is the nature of your investment?
A. Around $1,250,000. That is assessed by the state on our taxes.

Q. If you are talking about market value, we'd be talking about a different figure, would we not?

A. Yes.

Q. If you were selling it, what would you say it would be worth?

A. Close to $2,000,000.

Q. When someone makes a reservation at your motel, — strike that. Do you know, based upon your experience of this season, whether or not there was a decline in your business after the two fish limit became effective the third week in June?

A. Yes, there was a definite decline.

Q. To what do you attribute the decline?

A. Two fish.

Q. Why do you say that?

A. People decided they couldn't afford to come down for two fish.

(p. 2-138, line 22—p. 2-139, line 24)

Gail Schenk, Operator, Columbia Bar Charters (third day):

A. I am Gail Schenk, S-C-H-E-N-K, Box 339, Ilwaco, Washington.

Q. And what is your business?

A. We have the Columbia Bar Charters in Ilwaco, and we own three charter boats.

Q. By "we," who do you mean?

A. My husband and myself.

Q. And do your sons also work in the business?

A. My sons operate two of our charter boats; my husband operates the other one.

Q. How long has your family been in business?

A. We started our business as Columbia Bar Charters in 1966. Our boys decked for my husband several years

before that when he ran a charter boat. We have been in the business at least fifteen years.

Q. And are you responsible for the reservations, bookings, and record-keeping of Columbia Bar Charters?

A. Yes, I am.

(p. 3-56, lines 11-27)

Q. (By Mr. Pierson) Mrs. Schenk, can you tell us based on Exhibit 18 of your own knowledge of the industry and speaking with the customers, what effect the two-fish limit had on Columbia Bar Charters in Ilwaco?

A. Well, the Monday of June the 17th — we have eight boats all over twelve passengers — Monday on June 17th we had four customers. We had one hundred six on the Saturday before, because I sold that day as a three-fish day. I thought it was. I was confused, and a lot of people in Ilwaco were confused. They said midnight, June 15th, and I assumed June 15th meant midnight of that, and apparently it meant midnight of between the 14th and 15th. So we had one hundred six people that Saturday. I got notice late in the evening from the Fisheries Department — well, first I went to Olympia to ask when the three-fish went out and the two-fish came in, and I said I was confused, I thought it was the 15th, the night of the 15th, and they said they would let me know, they weren't sure. Mr. Hawe (phonetic spelling) explained to me, said: "Are more people confused?" I say, "Yes, we all are kind of up in the air." He explained to me then that he would let me know. So all through Friday of the 14th we still assumed we were on three-fish, until late in the evening I got a call from one of the wives of the Fishery men, who told me that we were going into two-fish the next day. It was late in the evening of Friday, the 14th, so we sold the 15th at three-fish, and we had one hundred six people. On Sunday, the 16th,

we dropped down to forty-five, and on Monday, the 17th, we dropped down to four. We had just a very poor latter two weeks of June. We had a very poor July. Our records show that our month of July was down just under three hundred people for the month of July, as compared to the month of July in '73. We have the same capacity boats; the same boats running through our office those two years.

Q. Now, what was the reason for that decline?

A. Well, I attribute it to the two-fish wholly and solely. Economically we thought we might have a problem, but we had such a good June we raised our prices at the opening of the season a dollar per passenger, which wasn't much, but to cover the expense of the anticipated raise in fuel and bait, and we thought maybe this might have an effect, but it didn't. Our first two weeks in June were very good, that is, throughout the economy. I figured that that might have a bearing. Then I figured the gasoline might have an effect, but it didn't, because we had the customers there in June. The first two weeks of June were very good. The only thing that changed after the 15th of June was the two-fish limit. We still had the same economy. We still had the gasoline problem. It just was bad. But the two-fish limit, the notoriety it got, it hurt us. It hurt us badly. We have vacation guides which go out all over the State, which go out all over probably the Northwest, that had articles that we had the two-fish. It was something you couldn't retract. It was something that was just there that everybody picked up those papers and read it and saw it, the two-fish, and we lived with that. Until we got the tourist trade, just the whole tourist trade back again, we suffered, and we suffered all through July.

Q. Do you have an opinion, Mrs. Schenk, what would have been the effect if the two-fish limit had continued throughout the '74 season?

A. Our office would have hurt, because we run basically on repeat customers. We are not the biggest, nor the most available. We have reservation customers, and we have repeat customers that come back to us. We lost those customers in July. We lost them the latter part of June. They had made reservations ahead of time elsewhere, and told me they did. They were friends of ours. We are kind of a friendly office. Most of our customers are our friends. They went to Oregon. We have companies that were based in Washington that cancelled out with us for their July trips. They had made their reservations the year before. I got notice earlier in the year that they cancelled out. They were going to Oregon because of our potential two-fish limit. We lost those people. They are hard to get back. You know, when you lose your customers to another community or another office or another port, you have to work real hard to get them back.

(p. 3-59, line 17—p. 3-62, line 9)

Jasper Elton Lasseter, Asst. Dir. of Operations, Fisheries (fifth day):

A. My full name is Jasper Elton Lasseter, L-A-S-S-E-T-E-R. I reside at Route 8, Box 448G, Olympia, Washington.

Q. By whom are you employed?

A. Washingtn State Department of Fisheries, Assistant Director in Charge of Operation.

Q. How long have you been employed by the State of Washington?

A. Twenty-three years last April.

Q. How long have you been employed by the Department of Fisheries? Has your employment all been with the Department of Fisheries?

A. Yes, it has.

Q. How long have you served in the capacity as assistant director?

A. I keep forgetting. I think it is 11 years.

Q. Prior to assuming your duties as assistant director for operations, what positions in the Department of Fisheries — what did your employment cover?

A. I was senior biologist in charge of — in the management research division in charge of all of the harvest of food fishes. Prior to that I was project leader on sport fishery work, and before that I worked in a laboratory at Bowmans Bay assessing the effects of pollutants on salmon and their food organisms and the rates and problems of acclimatizing young salmon from fresh water to salt water. Prior to that I went to the College of Fisheries. I had worked some part time jobs in fisheries and received a degree in fisheries from the University of Washington.

(p. 5-15, line 18—p. 5-16, line 16)

Q. (By Mr. Solomon) Would you state what guidelines, if any, were developed in formulating regulatory enactments responsive to the Boldt Decision?

A. Yes, the department was seeking or searching for those regulations which would reduce the non-treaty Indian share so the Indian share might be greater to reach toward the 50-50 allocation and trying to find whether those fish would be made available to Indian fisheries and searching for those possibilities which would do this with the least impact on the fishermen and the total state as possible.

Q. What were the regulatory proposals announced by the department as a result of its various staff meetings? What proposals were to be considered?

A. The director chose two proposals, a reduction in the sport bag limit from three fish per day to two fish per day, and he chose the proposal that all trolling would be prohibited within the three mile limit along the coast of the State of Washington.

(p. 5-22, lines 6-24)

Q. Was consideration given to limiting or regulating the troll fishery beyond the three miles?

(p. 5-56, lines 8-9)

A. I consider that area and, yes, the area beyond the three mile line was considered.

Q. Was that alternative rejected?

A. Yes, it was.

Q. Would you state why?

A. Because while we believe we can control individual Washington fishermen beyond the three mile limit, this does not give us control of the fishery.

Q. When you state it doesn't give you control of the fishery, what do you mean?

A. That fishermen could continue to fish beyond the three mile limit and land them elsewhere.

(p. 5-56, line 21—p. 5-57, line 2)

Q. Beyond the three mile limit are there others who fish the waters beyond three miles off the Washington coast?

A. You mean other Washington citizens?

Q. Other Washington citizens.

A. Yes, there are.

Q. Will you state who they are?

MR. BEAN: By name?

THE COURT: I am sure, Mr. Bean, he means groups of people.

MR. SOLOMON: Groups. I am sorry.

A. There are fishermen from all the coastal states, Alaska, Oregon, and California. There are Canadian fishermen. These are the salmon fishermen off our coast from other jurisdictions.

Q. Is there any alternatives or proposals or efforts by the Department of Fisheries to deal with the problem of the off shore trolling industry as it effects all of the

groups that fish out there that you have just described?

A. Yes, there are.

Q. Would you relate what those are?

A. We have endeavored as a state to work through the Marine Fisheries Commission to affect changes in the trolling pattern by the other states. We work through the United States with the director and the staff advising the United States government in negotiations with Canada wherein we urged that the Canadian troll fishery be diminished. We are urging the passage of a federal bill which would — I don't remember the legal word, but would allow the federal government to set regulations between the three and twelve mile limit. They have jurisdiction now, but no regulatory authority from Congress. We are strongly urging that this take place.

Q. In your opinion, Mr. Lasseter, would the imposition of regulations on Washington citizens beyond three miles restricting them from fishing beyond three miles, would that in your opinion have had the effect of returning more fish to the treaty Indians?

(p. 5-58, line 13—p. 5-59, line 21)

A. I believe there would be no appreciable return of fish to the Indian fishermen.

Q. (By Mr. Solomon) Would you state the basis for your opinion?

A. That fishermen from other states or Washington fishermen who had obtained licenses or landing permits in the other states would continue to fish and the fish would simply be landed elsewhere and that they would still be caught and therefore, the Indians would not have an opportunity to catch them.

(p. 5-60, line 29—p. 5-61, line 17)

Samuel G. Wright, Fish Resource Manager, Fisheries (sixth day):

Q. (By Mr. Solomon) Did any of the proposals that were submitted compromise any of the basic conservation principles?

Mr. Pierson: Objection, Your Honor, to the question. If we understand the question, the question is that it doesn't relate to anything specifically, doesn't relate to this case.

The Court: Is your question, were any of the statements of the Boldt decision in his opinion contrary to good salmon management? Is that what you are really asking?

Mr. Solomon: No. I think, Your Honor, the witness testified that there were certain aspects, pronouncements in the decision, the Boldt decision, that might be an incentive to compromise conservation, basic conservation principles, and I suppose I — maybe as a foundation I ought to ask what those were.

The Court: All right.

Q. (By Mr. Solomon) Would you state what you mean, what you have in mind when you state that there are parts of the decision or ruling that might compromise or be an incentive to compromising management conservation principles.

A. Well, as far as — I can only express this in terms of examples. There was, in other words, on the sharing thing, of course, when you start talking about numbers of fish you have got some — this is a definite incentive to increase size limits and cut down the numbers of fish, which in some cases conflicts with some basic conservation principles or yields that you can derive from resource. There were incentives to do things like reduce river sport catches where most of the catches are small jack salmon that pass through because of the way the thing was expressed in numbers. It was just, you know, some various incentives, of course, that did exist at the time to

make changes contrary to what you normally work with.

(p. 6-53, line 9—p. 6-54, line 15)

Q. (By Mr. Solomon) In formulating the proposals for 1974, a portion of which culminated in the sport bag limit reduction and the three-mile closure in territorial waters, did you consider the Oregon coastal and California salmon fisheries and the size of their fishing fleets?

A. That's correct.

Q. And why? What did you consider in that respect?

A. Well, we considered just basically what exists, that they do have — their salmon fisheries, of course, are just — with the exception of small river fisheries are just ocean fisheries, there are no fleet fisheries in existence south of the Columbia River, and they have also liberalized their regulations down there in having some impact on our stocks that we didn't have before, but the fisheries as exist are large and well developed fisheries, particularly the troll fisheries and they have the capability and do fish off the Washington Coast in significant numbers.

(p. 6-55, lines 12-30)

Samuel G. Wright (seventh day):

Q. All right. Let's break it down. Let me ask you this question: With respect to the Chinook run on Puget Sound stocks, isn't it a fact that Canadian fishermen take more than 50 percent of that stock?

A. I would say this is probably 50 percent or possibly more, yes, on Chinook.

Q. With respect to the Coho run on Puget Sound stocks what is the percentage that the Canadian fishermen take both troll and net fishery?

(p. 7-102, lines 24-30)

A. All fisheries combined, it is about 30 plus 15, well, let's see, about 45 percent, I would say, on the average for Puget Sound.

Q. So if I asked you the question as to what percentage of harvestable Chinook and Coho are taken by the Canadian fishermen, would you agree that it is in the range of 50 percent?

A. For Puget Sound fish, yes.

(p. 7-130, lines 1-10)

Samuel G. Wright (eighth day):

Q. Any idea how many fish were landed in Oregon?

A. In Oregon landings?

Q. Yes.

A. I have seen some estimates. I really don't — I see those things routinely. It just doesn't spring to memory.

Q. You say you have seen estimates. Would it be in the neighborhood of 500,000 fish or more?

A. Both Chinook and Coho?

Q. Yes.

A. Yes, it is definitely more than that. It is above that number.

Q. And it would be fair to say, would it not, that some of the ocean trollers in Oregon compete and fish in the same waters as the charter people from Ilwaco?

A. Yes, that's correct.

(p. 8-8, line 30—p. 8-9, line 15)

Q. All right. That same block of fish we are talking about managing, the Ilwaco and Westport example, the fishing effort by the charter fleet, if that fishing effort were reduced, would to a certain extent be reallocating those fish to the troll fishery beyond three miles,

which, as you have testified, is totally unregulated. Is that correct?

A. Yes. There's going to be transfers in that, yes. That is something that has to be figured in when you look at the —

Q. All right. And in addition to that, those fish moving northward, as you have indicated, as they would have to do to reach Puget Sound, would also be capable of being acquired and caught by the Canadian net fishery, is that correct, and the troll fishery which is unregulated by your Department?

A. This has happened to some extent, too.

Q. And it is totally unregulated by the Boldt decision. Is that correct?

A. I believe so.

(p. 8-12, line 27—p. 8-13, line 16)

Q. (By Mr. Bean) In 1970 is it fair to say that about 87 percent of the Chinook and Coho which were caught as shown on your Appendix No. 1, some study you did, on Exhibit 22, were caught beyond the three-mile area of the commercial troll salmon fishery?

A. It is approximately that.

Q. Approximately 87 percent, leaving about 13 percent of the troll fleet catching fish within the three-mile area?

A. Well, for those areas that are mentioned here, yes.

(p. 8-40, lines 1-10)

Q. And is it fair to say with regard to the Coho salmon in an even greater proportion over 90 percent of the Coho are caught beyond three miles?

A. Yes, I would say approximately 90 percent.

Q. And the commercial trollers are not regulated out of the area where 90 percent of the fish, of the Coho are caught, are they?

A. No.

Q. Not directly or indirectly?

A. Well, they are regulated in the sense that there are regulations on landings, I mean —

Q. Are there regulations affecting how many fish they can land that they catch outside?

A. No, there isn't.

(p. 8-40, line 19—p. 8-41, line 12)

Affidavit of Sam Wright, June 12, 1974:

Samuel G. Wright, being first duly sworn on oath, deposes and says:

That he is now, and at all times since November 1, 1972 has been, Supervisor of the Coastal Washington Salmon Management and Research Program for the Washington State Department of Fisheries; and gave the following statement at a public regulation hearing on April 19, 1974:

"In order to comply with the legal order requiring a greater availability of salmon to off-reservation treaty Indian fisheries, there is really only one general option available to the professional fishery manager. That, obviously, is to effectively reduce catch levels in major non-Indian sport and/or commercial salmon fisheries under State jurisdiction. The only other possibility would be to somehow shift fish from the necessary spawning ground escapement to Indian catches. This, of course, is completely unacceptable.

When considering the commercial troll fishery and the ocean sport fishery, we are dealing with Washington's two primary harvesters of chinook and coho salmon. The troll fishery accounts for about one-half of all State commercial landings (including Indian sales) for these two species. To be exact, in the past three years, trollers were responsible for 52% of all coho and 45% of all chinook landed commercially in the State. The impact of the ocean and outer Juan de Fuca Strait sport fishery is even more dramatic, for it accounts for 80% of the State's entire marine recreational catch.

For purposes of clarity, it should be noted that punch card Area No. 5 (Sekiu-Pillar Point) has been included as part of the "ocean sport fishery". This is because the biology of the fish taken in terms of size, age, maturity, migration patterns, etc. — is much closer to the ocean catch situation, not that of inner Puget Sound.

In reviewing potential restrictions for these two major fisheries, we were directed by two basic guidelines:

1. The need to effectively reduce catches and thus increase runs to Indian salmon fisheries in terminal areas; and
2. If possible, to choose those restrictive measures which would be least disruptive to each existing non-Indian fishery and its support industries.

For the commercial troll fishery, we carefully examined a group of potential restrictive measures involving areas, seasons and size limits. Since the State only has jurisdiction out to 3 miles offshore, we determined that more restrictive seasons and/or size limits would not really be effective, nor fair to Washington trollers, unless adopted by adjacent Pacific Coast states and Canada. We had some definite past experiences for guidance. For example, in the late 1940's, more restrictive regulations dealing with the coho season and chinook size limit were imposed for a portion of Washington's coast. Trollers continued to fish outside 3 miles in the supposed "closed area" and landed their catches as far away as S.E. Alaska ports. About 75% of the State's current troll landings are made by vessels with these same trip fishing capabilities.

Faced with this present jurisdictional situation, we felt that the only effective means to reduce actual troll catches would be a complete closure of all State waters. Our statistics show that very few fish were being reported as taken "inside 3 miles" due to the deterrent of a higher catch tax rate as opposed to offshore catches.

We fully realize that the specific numbers cited cannot be readily totaled up to arrive at expected ocean catch reductions or, conversely, increases in runs to

terminal fishing areas. There is a substantial amount of interaction among and between the major ocean sport and commercial troll fisheries. These will tend to reduce potential savings as will the presence of immature fish that, if not caught, would succumb to natural causes before ever reaching maturity. On the other hand, there are many factors which may further reduce ocean salmon catches but cannot be easily quantified at this time. For example, how many charter boat anglers can be expected to shun fishing under a reduced bag limit or how many trollers can be expected to shift their efforts to Alaska or California?

(p. 1, line 12 through p. 2, line 32; p. 3, lines 18 through 27)

Puget Sound Gillnetters v. Moos [88 Wn.2d 677 (1977)]

Stipulated Record

1. **Petitioners.** Petitioner, Puget Sound Gillnetters Association (PSGA) is a nonprofit organization, licensed and qualified to do business in the State of Washington. Petitioner PSGA includes in its membership approximately 600 gillnetters, the majority of the full time commercial gillnetters harvesting Coho and Chum salmon in the Puget Sound area. Petitioner Philip Sutherland, is a member and President of Petitioner PSGA. He is a resident of Washington State and a commercial gillnet fisherman who derives his income from gillnetting for Chinook, Coho, Sockeye, Chum and Pink salmon in the Puget Sound area. Petitioner Sutherland intends and is licensed by the Respondent to commercially fish with gillnet gear for Coho and Chum salmon in 1976.

2. **Intervening Petitioner.** Purse Seine Vessel Owners Association (PSVOA), is a nonprofit corporation licensed and qualified to do business in the State of Washington, and includes in its membership approximately 200 purse seiners, the majority of the full time commercial purse seiners harvesting Coho and Chum

salmon in the Puget Sound area and directly regulated in their fishing business by the Respondent. Petitioner, Frank Marinkovich (Marinkovich), is a member and Secretary-Treasurer of PSVOA, a resident of the State of Washington, and is a commercial purse seine fisherman who derives his income from purse seining for all species of salmon in the Puget Sound area. Marinkovich is duly licensed by Respondent and intends to fish commercially with purse seine gear for Coho and Chum salmon in the Puget Sound area in 1976, as he has done for many years past.

Intervening Petitioners, PSVOA and Marinkovich, have similar interests to Petitioners, PSGA and Sutherland herein, and they will be deprived of fishing time by Respondent's existing and proposed regulations, and said intervening Petitioners' claims and contentions herein and those set forth in the main action herein have questions of law and fact in common, and they should be permitted to intervene as Petitioners herein.

3. **Respondents.** Respondent, Donald W. Moos, is the Director of the Defendant, State of Washington Department of Fisheries, and said Department is an agency of the State of Washington. The Director and Department function pursuant to the statutory provisions set forth in RCW Title 75.

4. Subject to seasons and regulations established by the Director of Fisheries and subject to weekend closures established by statute, it is lawful to fish for commercial purposes with any lawful gear for Puget Sound origin salmon in Puget Sound fishing areas from the second Monday in September to and including the 30th day of November (RCW 75.12.010). Purse seine and gill net gear are lawful gear.

5. Washington State Department of Fisheries preseason prediction of Puget Sound origin coho was for a return to Puget Sound of 894,000 fish. Of the number returning to Puget Sound, 703,000 were expected to be available for harvesting over and above the needs for spawning purposes. Of the 703,000 fish available for harvest, 295,000

were predicted to be natural run coho, those artificially propagated from projects specifically for mitigation for known destruction of runs, i.e., dams, and coho from federal projects and cooperative projects involving treaty tribes. 408,000 were predicted to be hatchery produced fish from hatcheries funded unilaterally by the State of Washington.

6. Respondent is a party to the federal court action of *United States v. Washington*, 384 F.Supp. 312 (1974). The other parties to that action are the United States, State of Washington, and various Northwest Treaty Indians. Petitioners and Intervening Petitioners are not parties. Intervening Petitioners have been denied intervention, but appear as amicus.

7. Respondent has had requirements imposed on it by the judgment in *United States v. Washington, supra,* and subsequent orders of that court in the exercise of its continuing jurisdiction. These requirements are contained in the judgment in *United States v. Washington, supra,* pp. 342-343, 403. Subsequent significant orders imposing additional requirements include a temporary restraining order issued July 14, 1976, a copy of which is attached hereto and marked Exhibit A, an injunction and memorandum decision granting preliminary injunction which are issued by the court on 16 August, copies of which are attached and marked respectively Exhibits B and C. Additionally, on September 7, 1976, Judge Boldt ordered the Department to close all coho fishing for the week of September 12, 1976, to nontreaty commercial fishermen. A copy of that order is attached, marked Exhibit D. An Order on Certain Questions Re Fisheries Management was also entered by Judge Boldt. A copy is attached and marked Exhibit E. The following are excerpts from some of those orders and findings entered by the court which set out significant requirements and restrictions on Respondents.

A. Plaintiff-Intervenor tribes in United States v. Washington "shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all

fishermen at usual and accustomed grounds and stations." *U.S. v. Washington, supra* at p. 343.

B. In counting the fish for Plaintiff-Intervenor tribes, "fish taken on reservations shall not be included in any allocation of fish between treaty and nontreaty fishermen. * * *" and "fish taken to serve ceremonial and subsistence needs (of those tribes) shall not be counted in the share of fish that treaty right fishermen have the opportunity to take." *U.S. v. Washington, supra* at p. 343.

C. When reservation catch projections are furnished by the tribes, they shall govern unless shown to be significantly inaccurate on challenge by Respondents, and Respondents are required by subsequent order of the court in *U.S. v. Washington* to subtract reservation, ceremonial, and subsistence shares before computing treaty and nontreaty shares. ("Order on Certain Questions Re Fisheries Management" a copy of which is attached hereto and marked Exhibit E).

D. Respondents have been required:

> "to revise and to reorganize their regulatory action and enforcement so as to conform the same to all requirements of Final Decision No. 1 * * *"

and ordered to:

> "not adopt regulations or enforce any statute or regulations affecting the volume of anadromous fish available for harvest by a treaty tribe at usual and accustomed places unless such regulations are designed so as to carry out the purposes of the treaty provisions securing to the tribe the right to take fish." *U.S. v. Washington, supra* at p. 416

Respondents have been specifically required to:

> "make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathematical precision. * * *" *U.S. v. Washington, supra* at p. 420

E. Respondents are enjoined by subsequent order in *U.S. v. Washington* from excluding hatchery or artificially propagated fish in computing the share for treaty Indians.

("Order Granting Preliminary Injunction" a copy of which is attached hereto and marked Exhibit B.)

8. Attached marked Exhibit G and incorporated by reference herein are proposed regulations for the nontreaty commercial net Coho fishery in Puget Sound, which regulations were developed by Respondent in compliance with the requirements in *United States v. Washington, supra*. Those regulations, based upon anticipated returns, were developed to provide nontreaty fishermen fishing in Puget Sound commercial fisheries with 146,000 fish and treaty fishermen with 557,000 fish to be harvested in Puget Sound commercial net fisheries.

11. Preseason predictions of numbers of Puget Sound origin Coho which will actually return to Puget Sound areas are modified by Respondents to reflect additional information. In-season catch monitoring provides such information. Significant statistics utilized are measurements of the catch in Canadian fisheries in the outer Straits of Juan de Fuca and statistics from Puget Sound fisheries as they develop. Comparisons include total catch (by gear type), catch per unit of effort and comparisons with historical records.

The most optimistic of the indicators computed as of September 23, 1976 indicates the numbers of Coho returning to Puget Sound, after all interceptions, and prior mortalities, to be approximately 65% of the preseason prediction. Other indicators suggest a smaller total Coho run returning to Puget Sound.

As of September 23, Respondent has assumed for present management purposes that the numbers of Coho salmon which will actually return to Puget Sound after all prior interceptions and mortalities, is approximately 50% of preseason predictions. Respondent has cancelled previously established Puget Sound nontreaty commercial net seasons for Coho of Puget Sound origin.

12. Puget Sound origin Coho have also been harvested by Washington commercial trollers fishing in the Pacific Ocean and by Washington sport fishermen. Approximately 300,000 additional Coho salmon would

have returned to Puget Sound in 1976 had those fisheries not occurred.

13. The setting and revocation of these seasons have been intended to accomplish compliance with the above requirements of the federal court as to numbers of fish which must be provided treaty Indians. Even based upon the recently revised run size predictions, there are harvestable surpluses of Puget Sound Coho of both hatchery and natural origin. The regulations presently existing, *i.e.*, a total nontreaty commercial closure, will allow the harvest of all these fish by treaty Indians.

On September 22, 1976, Order No. 76-95 was superseded by Order No. 76-97 market Exhibit L and attached hereto, whereby all nontreaty commercial Coho fishing was closed. There has been no commercial gillnet or purse seine fishing authorized by the Respondent on 1976 Coho of Puget Sound origin.

15. Treaty fishermen's main method of harvesting Coho salmon in Puget Sound is through the use of gillnets, set nets and purse seines.

16. Commercial fishermen's main method of harvesting Coho salmon in Puget Sound is through the use of gillnets and purse seines.

17. The average Coho salmon when harvested commercially in Puget Sound in 1976 weighs approximately six pounds and the present price being paid for the Coho to the commercial fishermen is approximately 95 cents per pound. Both figures vary through the season.

18. Puget Sound origin Coho are available for harvest within Puget Sound marine net fisheries primarily from September through October. Before September, the Coho are migrating in marine waters and after October they have entered the fresh water streams where they are harvested only by sport fishermen and treaty Indian net fisheries.

19. The Department of Fisheries has issued approximately 1,500 licenses which authorize gillnet fishing in the 1976 Puget Sound fisheries.

20. There are approximately 600 to 700 treaty

fishermen expected to participate in the harvest of 1976 Puget Sound Coho stocks under treaty rights.

21. Artificial propagation of Coho salmon in Puget Sound through state funded hatchery programs commenced in 1895.

22. The language of the treaties which has been the basis for the decisions in *U.S. v. Washington, supra, Washington Game Department v. Puyallup Tribe*, 414 U.S. 44, 38 L.Ed.2d 254 (1973), *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 20 L.Ed.2d 689 (1968), and *Department of Game v. Puyallup Tribe*, 86 Wn.2d 664 (1976), are identical, and a copy of the treaty representative of that language is attached, marked Exhibit F and incorporated by reference herein.

First Supplemental Stipulated Facts:

23. Federal District Court Judge George Boldt under his continuing jurisdiction in *U.S. v. Washington*, 384 F. Supp. 312 (1974), has ordered the Director of Fisheries to enact regulations, which he has enacted, for the 1976 commercial fishing season which provide and make available a greater number of harvestable salmon and allow more fishing time to treaty Indian fishermen than to non-Indian fishermen in Puget Sound commercial fisheries. If it were not for said orders of Judge Boldt, the Director would provide and make available a greater number of such salmon and more fishing time to non-Indian commercial fishermen than is presently provided under existing regulations which are being challenged herein. At the time of the hearing (October 15, 1976) all Puget Sound commercial fishing areas (except Areas 7 and 7A in which the coho stocks are primarily of Canadian origin) are closed to non-Indian commercial fishermen, but treaty Indian commercial fishermen are allowed to fish in several of these areas otherwise closed to non-Indian fishermen, as more particularly described on the chart attached hereto as Exhibit M.

25. In proposing 1976 Puget Sound commercial salmon fishing regulations, Fisheries proposed regulations

which would have allowed non-Treaty fishermen to harvest all artificially propagated salmon propagated by the state. As a result of Judge Boldt's injunction referred to in Paragraph 7 above enjoining the state from excluding hatchery or artificially propagated fish in computing the share for treaty Indians, Fisheries present regulatory pattern extends Indian treaty rights to all hatchery fish.

27. Fisheries regulations are often promulgated on an emergency basis, commonly leaving little time for court review in advance of their effective date. This action involves matters of continuing and substantial public interest. The questions presented for resolution here shall recur in the future.

Second Supplemental Stipulated Facts:

The parties hereto have heretofore filed Stipulated Facts and First Supplemental Stipulated Facts in this action. They hereby stipulate to the following additional facts to update the record in this action to include the events of the 1977 Puget Sound and Grays Harbor commercial salmon fisheries. Paragraph numbers shall run in sequence from the First Supplemental Stipulated Facts.

28. On or about July 22, 1977 Respondents, pursuant to RCW Ch. 75, adopted regulations governing commercial gillnet and purse seine salmon fishing for Puget Sound Chinook, Coho, Pink and Chum Salmon. On July 25, 1977 the defendants issued a summary of the 1977 Puget Sound Chinook, Coho, Pink and Chum Commercial Fisheries Regulations. Said regulations applied without discrimination to all Washington State citizens engaged in commercial salmon fishing and did not allocate fish between treaty Indians and other commercial fishermen. A copy of said summary is attached hereto as Exhibit A and by this reference incorporated herein.

29. On August 10, Judge Boldt, under his continuing jurisdiction in *U.S. v. Washington*, Cause No. 9213, issued a Memorandum Order and Preliminary Injunction, a copy of which is attached hereto as Exhibit B and by this

reference incorporated herein, in which he assumed overall supervision of Puget Sound commercial fishing and exclusive control and authority for the management of Puget Sound treaty Indian fishing. He ordered respondents to present to the court regulations for non-treaty Chinook, Coho and Chum Salmon fishery consistent with his determined allocation of such fish between treaty Indians and non-treaty commercial fishermen. In addition, Judge Boldt ordered the respondents to "adopt, administer and enforce such regulations which have been found necessary to manage the non-treaty allocation and provide for proper spawning escapement."

30. In response thereto, Fisheries adopted emergency regulations, copies of which is attached hereto as Exhibit C and by this reference incorporated herein, which closed certain waters in Puget Sound to non-treaty commercial fishing, i.e., canceled open fishing periods in Elliott Bay, northern Carr Inlet and part of Budd Inlet.

Their purpose was to allow treaty Indians to harvest the number of salmon which Judge Boldt decreed to be theirs. See Fisheries' News Release No. 77/189 of August 12, 1977, a copy of which is attached hereto as Exhibit D, and by this reference incorporated herein.

31. On August 22, 1977, Puget Sound Gillnetters Association (PSGA), and Purse Seine Vessel Owners Association (PSVOA) filed an action for declaratory judgment in Thurston County Superior Court (*Puget Sound Gillnetters Assn., et al. v. Sandison*, Cause No. 58107). They requested the court to enter an order that the regulations adopted by Fisheries in response to the Preliminary Injunction issued by Judge Boldt are beyond the scope of the authority of Respondent and, therefore, void. Petitioners also sought an injunction enjoining Respondents, the State of Washington, and its officers from interferring with the harvest by PSGA and PSVOA members of Puget Sound salmon not required to preserve, protect and perpetuate the species.

32. On August 25, 1977, and in reliance upon this Court's ruling in *Puget Sound Gillnetters Assn. v. Moos*,

88 Wn.2d 677 (1977), The Honorable Frank E. Baker, Judge, Thurston County Superior Court, entered a Preliminary Injunction in *Puget Sound Gillnetters Assn. v. Sandison,* which enjoined the Director and Fisheries from prohibiting commercial salmon fishing in Puget Sound during the calendar year 1977 for reasons other than conservation purposes. A copy of the Preliminary Injunction is attached hereto as Exhibit E and by this reference incorporated herein.

33. On August 25, 1977 Fisheries adopted an Emergency Order, No. 77-77, to comply with the Preliminary Injunction issued by Judge Baker in *Puget Sound Gillnetters Assn. v. Sandison.* The Emergency Order repealed prior allocation orders adopted in compliance with orders entered by Judge Boldt. A copy of said order is attached hereto as Exhibit F and by this reference incorporated herein.

34. On August 26, 1977 Judge Boldt, in *U.S. v. Washington* No. 9213, entered a Temporary Restraining Order (TRO), staying the State Court Injunction issued by Judge Baker. In his order Judge Boldt stated that,

> "A Federal Court allocation was necessary *only* because the State Supreme Court had frustrated the effectiveness of this court's prior orders by deciding that the Director of the Department of Fisheries could not allocate fishing opportunity between treaty and non-treaty fishermen."

The TRO entered by Judge Boldt temporarily prohibited and enjoined Judge Baker from enforcing his Temporary Injunction of August 24, 1977 in any manner or extent and from issuing any other order in that action which, in effect, would prevent Fisheries from fully enforcing regulations adopted in compliance with orders entered by Judge Boldt. The TRO also directed the Director and Fisheries not to obey, carry out, enforce or otherwise treat as having any lawful force or effect Judge Baker's order. (Copy attached as Exhibit F-1.)

35. Pursuant to Judge Boldt's order on August 26, 1977, Fisheries adopted an emergency order, No. 77-79.

Said order repealed Order 77-77 and set aside the original regulations adopted by Fisheries on July 22, 1977 regulating the 1977 Puget Sound commercial fishery. A copy of said order is attached hereto as Exhibit G and by this reference incorporated herein.

36. On August 31, 1977 Judge Boldt entered a Preliminary Injunction in *U.S. v. Washington,* No. 9213, which enjoined and prohibited the Thurston County Superior Court "from in any manner or to any extent enforcing the Temporary Injunction issued by said court on August 24, 1977, in No. 58107, and from issuing any other order in said cause which, in effect, will prevent the Department of Fisheries from fully complying with the orders of this court." (Copy attached as Exhibit G-1.)

37. On August 31, 1977, Judge Boldt entered a "Temporary Restraining Order Re: Enforcement of 1977 Fisheries" (TRO). The TRO provided that all commercial net fishermen licensed by the State of Washington, the Puget Sound Gillnetters Association (PSGA), the Purse Seine Vessel Owners Association (PSVOA), and all persons in active concert and participation with them are temporarily restrained from engaging in taking, possessing or selling salmon of any species in violation of the Court's Orders of August 10, 1977, or August 31, 1977, or state regulations adopted pursuant to the orders of the court. The TRO further required the United States to take all necessary steps to manage the fishery and to enforce the orders of the court. (Copy attached as Exhibit G-2.)

PSGA, PSVOA, and their individual members *are not* parties in *U.S. v. Washington.*

38. Pursuant to Judge Boldt's orders on September 19, respondents adopted emergency order, No. 77-94, a copy of which is attached hereto as Exhibit H and by this reference incorporated herein, which closed Areas 6B, 8, 9, 10 and 11 to all non-Indian commercial salmon fishing effective Tuesday, September 20. According to Fisheries' News Release No. 77/229, said areas were closed to allow treaty Indians the opportunity to take their share of the salmon harvest and the areas would remain closed to

non-Indian commercial fishermen until further notice. A copy of said news release is attached hereto as Exhibit I and by this reference incorporated herein. But for Judge Boldt's orders, these areas would have been open to non-treaty commercial fishing.

39. Pursuant to Judge Boldt's order, on September 23, 1977 respondents adopted an emergency order, No. 77-97, which provided fishing time for non-treaty commercial fishermen during the week of September 25, the Director indicated in a letter, a copy of which is attached hereto as Exhibit J and by this reference incorporated herein, that Areas 6B, 9 and 10 were not open as previously scheduled because the non-treaty share of Coho, as established by Judge Boldt, has been taken.

40. Several non-treaty commercial fishermen have been cited by Federal officials and ordered to appear before Judge Boldt to show cause why they should not be held in criminal contempt for fishing in violation of his orders of August 31 and emergency orders adopted by the Director in compliance therewith.

41. Pursuant to Judge Boldt's order allocating Coho between treaty Indians and non-treaty commercial fishermen, on September 27, 1977 the Director adopted emergency order, No. 77-101, which closed the gillnet season in Grays Harbor to non-treaty commercial fishermen. This closure was extended by an emergency order, No. 77-105. Copies of the Director's letters containing said orders are attached as Exhibits K and L, respectively, and by this reference incorporated herein.

42. On September 27, 1977 Judge Boldt entered a Preliminary Injunction Re the Enforcement of 1977 Fisheries, a copy of which is attached hereto as Exhibit M, and by this reference incorporated herein. The Preliminary Injunction provides:

> (1) "All Puget Sound and other marine waters easterly of Bonilla Point-Tatoosh line and their watersheds, all Olympic Peninsula watersheds, and all Grays Harbor watersheds are hereby closed to all net salmon fishing except during such times and such

> specific waters as are open by State of tribal regulations, or regulations of the United States conforming to the orders of this court in this case;"
>
> (2) All net fishermen licensed by the State of Washington, PSGA and PSVOA are enjoined from engaging, taking, possessing or selling salmon of any species taken from the above waters unless that individual has first determined from the Fisheries' hotline that the area which he intends to fish is open at that time;
>
> (3) The State of Washington was to serve by certified mail, return receipt requested, on all State licensed commercial fishermen a copy of the Court's Preliminary Injunction; and
>
> (4) The State of Washington was ordered to cite any fishermen who had received notice of the Preliminary Injunction and thereafter fishes in violation of the provisions of the Preliminary Injunction.

43. On September 28 Judge Boldt ordered respondents to allocate the salmon harvest in Grays Harbor so as to provide the treaty Indians with 45 percent of the chinook and coho and 50 percent of the chum which will return during the 1977 fishing season.

44. On September 29 the Director adopted a non-treaty commercial fishing schedule in Puget Sound for the week of October 2. In a letter setting out said schedule, a copy of which is attached hereto as Exhibit N, and by this reference incorporated herein, the Director said that the schedule was as directed by Paragraph E of Memorandum and Preliminary Injunction issued by U.S. District Court Judge George Boldt on August 31, 1977.

45. On October 4 the Thurston County Superior Court in *Grays Harbor Gillnetters Assn. v. Sandison*, Cause No. 58462, ordered respondents to promulgate emergency regulations which do not restrict commercial salmon fishing in Grays Harbor except for conservation purposes. On October 5 respondents adopted Order 77-108, a copy of which is attached as Exhibit N-1 which

repealed the earlier closure of Grays Harbor, thus opening the fishery by petitioners.

46. On October 5, Judge Boldt, in *U.S. v. Washington*, entered a Temporary Restraining Order (TRO) which stayed the Thurston County Superior Court and "from issuing any other order in said cause, or in any other cause, which will have the effect of preventing the State of Washington, the Washington State Department of Fisheries, or the officers and agents, from fully complying with the orders of this court." A copy of this TRO is attached hereto as Exhibit O and by this reference incorporated herein.

47. On October 6, the Chief Justice of this Court entered an order in *Grays Harbor Gillnetters Association v. Sandison*, Cause No. 45114 (copy attached as Exhibit O-1).

48. On October 7, 1977, respondents Fisheries adopted emergency regulation Order No. 77-110 to comply with that order (copy attached as Exhibit O-2) which by repealing earlier closures had the effect of opening fishing seasons in certain areas of Washington.

49. On October 8, 1977, Judge Boldt entered a Temporary Restraining Order (copy attached as Exhibit O-4) which enjoined future openings of non-treaty fisheries from being placed on the Hot Line without approval of that court, its expert or its advisory board. That order also specified what information was ordered to be provided over the Hot Line. Specifically the message was directed to include the fact areas were closed by order of the federal court and fishing in violation of those closures could subject fishermen to contempt charges.

50. On October 17, 1977, Judge Boldt entered a Preliminary Injunction Staying Thurston County Superior Court. (Copy attached hereto as Exhibit O-5) which enjoined the Superior Court from "in any manner or to any extent enforcing the temporary injunction issued by said Court (per the Honorable Frank Baker) on October 4, 1977, in Cause No. 58462, and from issuing any other order in said cause, or in any other cause, which will have

the effect of preventing (respondents) from fully complying with the orders of this court." (Page 3)

51. On October 17, 1977, Judge Boldt entered another Preliminary Injunction (Exhibit O-6) continuing in effect the notification system summarized in Paragraph 42 above.

52. Gordon Sandison has been appointed Director of Fisheries and as such has replaced Donald Moos. If this court issues a writ of mandate to the Director, it should issue the mandate to Gordon Sandison.

53. If it were not for the orders of Judge Boldt under his continuing jurisdiction in *U.S. v. Washington*, the Director would provide and make available a greater number of salmon and more fishing time to non-Indian commercial fishermen than has been previously made available under the orders of the United States District Court.

54. The 1977 Puget Sound commercial salmon fishing season runs from September 12 through November 30. As of October 24 over 975,000 coho have been taken in Puget Sound commercial (including Indian) fisheries. By the end of the season, it is forecast over one million will have been taken with aproximately 800,000 being of Puget Sound origin stocks. The average coho when harvested weighs approximately 7½ pounds and the present price being paid for the coho to commercial fishermen is approximately $1.00 per pound.

55. Fisheries' regulations are often promulgated on an emergency basis, commonly leaving little time for court review in advance of their effective date. This action involves matters of continuing and substantial public interest. The questions presented for resolution here shall recur in the future.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, vs. STATE OF WASHINGTON, *Defendant-Appellant*, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants*, NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS, *Intervenor-Defendant-Appellant*.	No. 74-2414 OPINION
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, vs. STATE OF WASHINGTON, *Defendant*, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants*, WASHINGTON REEF NET OWNERS ASSOCIATION, *Intervenor-Defendant-Appellant*.	No. 74-2437
UNITED STATES OF AMERICA, *Plaintiff*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, on its own behalf and on behalf of the QUEETS BAND OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, UPPER SKAGIT RIVER TRIBE, AND QUILEUTE INDIAN TRIBE, *Plaintiffs-Appellants*, vs. STATE OF WASHINGTON, *Defendant-Appellee*, THOR C. TOLLEFSON, etc. et al., *Intervenors-Defendants*.	No. 74-2438

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs,*
vs.
STATE OF WASHINGTON, *Defendant-Appellant,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants,*
CARL CROUSE, Director of the Department of Game, the WASHINGTON STATE GAME COMMISSION, *Intervenors-Defendants-Appellants.*

No. 74-2439

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs,*
vs.
STATE OF WASHINGTON, *Defendant-Appellant,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, *Intervenor-Defendant-Appellant.*

No. 74-2440

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs,*
vs.
STATE OF WASHINGTON, *Defendant,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants,*
WASHINGTON REEF NET OWNERS ASSOCIATION, *Defendant-Appellant.*

No. 74-2567

UNITED STATES OF AMERICA, *Plaintiff,*
QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs,*
PUYALLUP TRIBE OF PUYALLUP RESERVATION, *Plaintiff-Appellant,*
vs.
STATE OF WASHINGTON, *Defendant-Appellee,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants.*

No. 74-2602

UNITED STATES OF AMERICA, *Plaintiff,*
QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs,*
NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, *Plaintiff-Appellant,*
vs.
STATE OF WASHINGTON, *Defendant-Appellee,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants.*

No. 74-2705

[June 4, 1975]

On Appeal from the United States District Court
for the Western District of Washington

Before: CHOY and GOODWIN, Circuit Judges,
and BURNS,* District Judge.

CHOY, Circuit Judge:

The United States brought this suit to enforce compliance by the State of Washington and its Departments of Game and Fisheries with certain treaties between the federal government and various Indian tribes of western Washington (treaty Indians; treaty tribes). The Government initially represented the interests of seven named tribes. Other tribes intervened, and fourteen tribes are now named parties plaintiff. Organizations of commercial and sports fishermen intervened as party defendants or participated as amici curiae.

The district court found that Washington could not apply its existing fishing regulations to members of the treaty tribes without violating their federal treaty rights. The court held that the state could enforce only those regulations necessary for conservation, decreed an allocation of fishing opportunity between treaty Indians and other citizens,[1] and retained continuing jurisdiction to provide advance judicial scrutiny of all future state regulations affect-

*The Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

[1]"Other citizens" includes a substantial number of citizens of Indian ancestry who are no longer enrolled members of treaty tribes.

ing Indian treaty fishing rights. *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974). Both sides appealed.[2] We affirm and remand.

Historical Background

In the early 1850's, an increasing flow of American settlers poured into the lowlands of Puget Sound and the river valleys north of the Columbia. Washington Territory was organized in 1853. Isaac Stevens, its first governor, was commissioned to smooth the way for settlement by inducing the Indians of the area to move voluntarily onto reservations.

George Gibbs' official chronicle of the treaty proceedings reveals the governor as a tactful and effective negotiator. He united the scattered Indian communities into a number of tribes and selected "chiefs" from each tribe with whom to bargain. The Indians west of the Cascade Mountains were known as "fish-eaters"; their diets, social customs, and religious practices centered on the capture of fish. Their fish-oriented culture required them to be nomadic, moving from one fishing spot to another as the runs varied with the seasons. Stevens nevertheless persuaded them to settle down on designated reservations, thus freeing the great bulk of the land for American settlement without a bloody war of conquest. In exchange, he promised the tribes money and the benefits of the white man's civilization—material goods and education. Governor Stevens assured them, moreover, that they were restricted to the reservations only for the purpose of residence; he explained that they would remain free to fish off the reservations at their traditional fishing places in common with the white settlers.

In negotiating the treaties, Stevens read a predrafted document and asked for the Indians' comments and approval. Although the treaties read as typical legal documents, few if any of the Indian negotiators read or spoke English. The treaties and the Americans' explanation of their terms were translated into Chinook jargon, a trade medium of some 300 words common to most Northwest Indians. The district court found that the jargon was inadequate to express more than the general nature of the treaty provisions.

[2]The tribes have contended on appeal that the state may not regulate their fishing activities at treaty locations for any reason. Their assertion is foreclosed by the decision in *Puyallup Tribe of Indians v. Dept. of Game of Washington,* 391 U.S. 392 (1968).

During 1854 and 1855, Stevens executed treaties with all of the treaty tribes. Each treaty contained a provision guaranteeing off-reservation fishing rights similar to that found in the Treaty of Medicine Creek, 10 Stat. 1132:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . .

To this day, fishing remains an important aspect of Indian tribal life, providing food, employment, and an ingredient of cultural identity. Indians have adopted modern techniques of sport and commercial fishing. They share the concern of other citizens with preservation of runs of anadromous fish. Some tribes regulate the times and manner of fishing by their members.

Decree of the District Court

The district court held that the state and its agencies can regulate off-reservation fishing by treaty Indians at their usual and accustomed grounds only if the state first satisfies the court that the regulation is reasonable and necessary for conservation. The court defined "conservation" as the perpetuation of a run or of a species of fish. The state must also show that the conservation objective cannot be attained by restricting only citizens other than treaty Indians. In addition, the regulation must not discriminate against treaty Indians and must meet appropriate due process standards.

Those treaty tribes meeting certain qualifying requirements (384 F. Supp. at 340-41) may regulate fishing by their own members free from any state regulation. Qualified tribes will be required, however, to fulfill certain conditions designed to keep the state informed concerning their regulations and fishing activities. The court found the Yakima Nation and the Quinault Tribe already qualified for self-regulation.

Each year, a certain escapement of fish is necessary to preserve the run. After this escapement has been allowed by either state or tribal regulation, the remainder of the run is available for harvest. The court decreed an allocation of this harvestable run between the treaty tribes and other citizens. The state may not regulate treaty Indians' taking of this harvestable run at their

"usual and accustomed grounds and stations" unless necessary to limit them to 50 percent of the harvest at those grounds. Treaty Indians thus are to have the opportunity to take up to 50 percent of the available harvest at their traditional grounds.

The harvest to be allocated comprises not merely those fish which actually pass the traditional fishing grounds, but also those captured en route and those bound for those grounds but caught in marine waters by non-treaty fishermen. The court decreed an "equitable adjustment" to the harvestable catch to compensate for attrition from these sources. On the other hand, those fish caught by treaty Indians on reservations or taken for traditional tribal ceremonies or personal consumption by tribal members and their immediate families are to be totally disregarded in calculating the harvestable catch.

The state and its agencies challenge virtually all of these features of the district court's decision.

Federal Preemption of State Regulation

By virtue of its police power, the state has initial authority to regulate the taking of fish and game. *Geer v. Connecticut,* 161 U.S. 519 (1896). The federal government, however, may totally displace state regulation in this area. For example, Congress has the power, under the commerce clause, to authorize construction of hydroelectric facilities, even though a dam totally destroys existing runs of fish in the river in violation of the public policy of the state and the desires expressed by a majority of its enfranchised citizens. *See City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958); *Washington Department of Game v. FPC,* 207 F.2d 391 (9th Cir. 1953), *cert. denied,* 347 U.S. 936 (1954). The federal government may also preempt state control over fish and game by executing a valid treaty and legislating pursuant to it. *Missouri v. Holland,* 252 U.S. 416, 432 (1920). Furthermore, such a treaty may preempt state law even without implementing legislation; a treaty guaranteeing certain rights to the subjects of a signatory nation is self-executing and supersedes state law. *Asakura v. City of Seattle,* 265 U.S. 332, 341 (1924). Consequently, the state may enact and enforce no statute or regulation in conflict with treaties in force between the United States and the Indian nations.

At issue, however, is not the federal government's power in executing treaties to preempt all state regulation of Indian fiishing, but whether it has in fact done so. "Absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-49 (1973); *see Carey v. South Dakota,* 250 U.S. 118, 122 (1919). A treaty guaranteeing a right to fish distinct from that enjoyed by other citizens would be such an "express federal law." In deciding whether the Stevens' treaties created federal rights immune from abridgement by state law, we must read their terms against a "backdrop" of Indian sovereignty, recalling that when the treaties were signed, the United States regarded the tribes as nations, independent and sovereign. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (1973).

Although the United States dealt from a clearly superior position, the treaties were negotiated at arms' length. The treaties were not dictated to a defeated nation. The United States wished to free most of the land in the Puget Sound area for the impending white migration and settlement. Governor Stevens' task in executing the treaties was to induce the Indians to move onto reservations. The Indians expressed their concern that they would be unable to continue their traditional way of life, centered on the gathering of fish, because of limited fishing opportunities on the proposed reservations. The governor overcame their fears by promising them continued access to their traditional fishing areas off the reservations.

The treaties were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *United States v. Winans,* 198 U.S. 371, 381 (1905). The extent of that grant will be construed as understood by the Indians at that time, taking into consideration their lack of literacy and legal sophistication, and the limited nature of the jargon in which negotiations were conducted. *See id.* at 380. Although ceding their right to occupy the vast territories in which they had been accustomed to roam unimpeded, the Indians reserved their traditional right to fish at their accustomed places. They granted the white settlers the right to fish beside them. In a sense, the treaty cloaks the Indians with an extraterritoriality while fishing at these loca-

tions. Although present Indian status is not understood in terms of tribal sovereignty, recalling past acceptance of that concept aids in perceiving the Indians' understanding of the effect of the treaties which they signed. They retained the right to continue to fish as they were accustomed. Certainly, they did not understand that in permitting other citizens access to their traditional fishing areas they were submitting to future regulations calculated to benefit those other citizens.

Nevertheless, this is precisely how the state of Washington has regulated fishing for years. In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory. As the non-Indian population has expanded, treaty Indians have constituted a decreasingly significant proportion of the total population, catching a decreasing proportion of a fixed or decreasing number of fish. "This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans,* 198 U.S. at 380. *See Antoine v. Washington,* 94 S. Ct. 944, 951 (1975).

In summary, the Indians negotiated the treaties as at least quasi-sovereign nations. They relinquished millions of acres of their lands, retiring to reservations carved out of those lands. But they expressly reserved their indispensable rights to fish at their traditional places. The United States obtained for the settlers and for the subsequently-admitted state only the right of equal access to these fishing grounds. The treaty provision at issue grants the state's other citizens only a limited right to fish at treaty places; it thus is "express federal law" preempting all state regulation of Indian fishing at the treaty fishing grounds, except as hereafter stated. *Compare Mescalero,* 411 U.S. at 148-49.

State Regulation for Conservation

The relationship between treaty Indians and other fishermen which these treaties created is unique. The two groups of fishermen do not share a cotenancy in the fish or in the opportunity to fish. Nevertheless, their relationship is analogous to a cotenancy, and the experience of courts in adjusting competing claims between cotenants sheds light on the interpretation of the parties' treaty rights.

Cotenants stand in a fiduciary relationship one to the other. Each has the right to full enjoyment of the property, but must use it as a reasonable property owner. A cotenant is liable for waste if he destroys the property or abuses it so as to permanently impair its value. *See* Comment, *The Inter Vivos Rights of Cotenants Inter Se,* 37 Wash. L. Rev. 70, 76 (1962). A court will enjoin the commission of waste.

By analogy, neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed. The state may interfere with the Indians' right to fish when necessary to prevent the destruction of a run of a particular species in a particular stream. Thus, the Supreme Court has held that the state may regulate the time and manner in which the Indians take their catch when "necessary for the conservation of fish." *Puyallup Tribe v. Department of Game of Washington (Puyallup I),* 391 U.S. 392, 399, 402 n.14 (1968); *Tulee v. Washington,* 315 U.S. 681, 684 (1942).

The state defines "conservation" to embrace three objectives and urges that it should be allowed to curtail Indian fishing in pursuit of conservation so defined: 1) allowing sufficient escapement to perpetuate the fish run; 2) assuring the maximum sustained harvest; and 3) providing for an orderly fishery. But the only rationale for permitting state interference with Indian fishing precludes adoption of this definition and restricts the meaning of conservation to insuring optimum spawning escapement for perpetuation of the run. "Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival." *Department of Game of Washington v. Puyallup Tribe* (Puyallup II), 414 U.S. 44, 49 (1973).

The state's program for management of the state's fisheries may appear sound and commendable, but the state shares its rights in those fisheries with another party. It may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens. The state must pursue its goals as best it can by regulating its own non-treaty Indian citizens. The state may secure treaty Indians' compliance with these regulations only by gaining their acquiescence in its goals. Direct regula-

tion of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction. *Antoine v. Washington,* 94 S. Ct. 944, 952 (1975).[3]

Tribal Self-regulation

Preservation of fishery resources is of vital importance to Indians as well as to other citizens. At the same time, regulatory interference by the state with treaty fishing is obnoxious to the treaty tribes. These tribes have the power to regulate their own members and to arrest violators of their regulations apprehended on their reservations or at usual and accustomed fishing sites. *Settler v. Lameer,* (9th Cir., Nov. 26, 1974). The court, in its equitable discretion, decided that qualified tribes should have the power, subject to certain conditions, to regulate their own members in the interest of conservation free of state controls. So long as the tribes responsibly insure that the run of each species in each stream is preserved, the legitimate conservation interests of the state are not infringed. We hold that the court did not abuse its discretion.[4]

[3]The Supreme Court observed that "the State must demonstrate that its regulation is a reasonable and necessary conservation measure . . . *and* that its application to the Indians is necessary in the interest of conservation." *Antoine,* 94 S.Ct. at 952 (emphasis by the Court). This limitation on the state's police power is nullified in practice when, as here, a court has ordered an apportionment of the opportunity to take the harvestable run. By apportioning between treaty Indians and other citizens the opportunity to take all fish not needed for escapement, the court in effect requires treaty Indians to contribute to preservation of the run. To do so deprives the Indians of no rights. Both treaty Indians and other citizens share responsibility, as quasi-cotenants, for the run's perpetuation. In *Antoine,* the Court denied the state's power to *compel* the treaty tribes to assist in assuring optimum escapement; it did not question the tribes' moral or equitable duty to do so. The tribes have come to court seeking equity in allocation of the harvestable catch; the court may first require them to fulfill their equitable responsibility to allow sufficient escapement.

[4]In *Kennedy v. Becker,* 241 U.S. 556 (1916), the Court rejected a concept of "dual sovereignty" by which the state would regulate non-Indians exclusively, and the tribe, Indians. The Court held that such a duality would be unworkable; either entity would be able to destroy the resource, free of check by the other. *Id.* at 563. Neither the *Settler* panel nor we advocate such a duality. The tribe possesses a power of enforcement inferable from its power to regulate. *Settler* (slip op. at 13). This power does not displace that of the state; ordinarily the state and the tribe possess concurrent power to regulate Indian fishing at usual and accustomed sites so far as necessary to preserve the run. However, the district court has enjoined the state's exercise of its power in order to advance the congressional policy of promoting tribal autonomy. If tribal self-regulation proves impracticable, we are certain that the court will revise this feature of its judgment.

Apportionment of the Right to Fish

The necessity to limit the catch to preserve a run defines the extent to which the state may exercise police power to regulate Indian fishing. By the treaty, the Indians granted citizens of the territory the right to fish in common with them, however, and the state may enforce regulations insuring that both groups of fishermen have fair access to the fish at the treaty areas. State officials are in close daily contact with fishing conditions in Washington; they should be permitted a certain amount of flexibility in devising rules to assure both groups opportunity to exercise their rights. In so regulating, however, they must be aware that they are not enforcing state policies but applying federal rights to concrete situations. Therefore, the district court wisely insisted that proposed state regulations be submitted to it for approval before being enforced as to treaty Indians.

The treaty provides only that those Indians may fish "in common with" other citizens at the traditional grounds. The legal effect of this clause has been much disputed. The district court interpreted it as justifying an equal apportionment of the opportunity to take fish:

> [N]on-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish . . . .

384 F. Supp. at 343.

The state argues that the term "in common with" was intended merely to insure that the treaty Indians would not be treated discriminatorily, that each Indian should have access to the traditional fishing grounds on the same footing as each white settler. The Supreme Court long ago considered this construction, how-

ever, and rejected it. *United States v. Winans*, 198 U.S. 371, 379-82 (1905).

In the early years following the signing of the treaties, a policy of providing all individuals with equal access to fishing grounds sufficiently guaranteed all parties' rights under the treaties. White civilization has since engulfed that of the Indian, however. Demand for fish has outstripped supply. By continuing to treat the outnumbered treaty Indians no differently from other citizens, the state effectively allots them a decreasing share of the resource.

A cotenant dissatisfied with his partner's exploitation of their common property may seek a partition of the property in order to protect his interest in it. Comment, *supra*, 37 Wash. L. Rev. at 77. By analogy, the Indians are entitled to an equitable apportionment of the opportunity to fish in order to safeguard their federal treaty rights. *See* ***Puyallup II***, 414 U.S. at 48-49. The district court's apportionment does not purport to define property interests in the fish; fish in their natural state remain free of attached property interests until reduced to possession. *Geer*, 161 U.S. at 529. Rather, the court decreed an allocation of the *opportunity* to obtain possession of a portion of the run.

The district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public. *See Lemon v. Kurtzman*, 411 U.S. 192, 200-01 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). In legislative reapportionment cases, for example, the Supreme Court has been content to review and decide the broad standards (one man, one vote) dictated by the fourteenth amendment, leaving the details of the implementation of those standards to the equitable discretion of the district courts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Similarly, we propose to state only those fundamental legal principles which define the parties' respective rights, reviewing the remainder of the district court's decree only for abuse of discretion.

We affirm the conclusion of the district court that the fundamental principle to be applied in a judicial apportionment is that treaty Indians are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds. This conclusion follows naturally from the circumstances in which the treaties were signed.

The treaties must be viewed as agreements between independent and sovereign nations. *McClanahan*, 411 U.S. at 172. The "tribes" in western Washington were constructed somewhat arbitrarily by Governor Stevens for his convenience in negotiating the treaties. Each tribe in many cases was an aggregate of smaller, more natural units—communities or villages. Nevertheless, each tribe was understood to be an entity for the purpose of each treaty.

Each tribe bargained as an entity for rights which were to be enjoyed communally. *See Sac and Fox Indians (Iowa) v. Sac and Fox Indians (Oklahoma)*, 220 U.S. 481, 483-84 (1911). The reservations were reserved to each tribe *qua* tribe. Not until 1887 was the President authorized to allot reservation land to individual Indians. 24 Stat. 388. Individual Indians had no individual title to property, but participated in the communal rights of the tribe. "The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation." F. Cohen, Handbook of Federal Indian Law 183 (1942, reprinted 1971). The right to fish at usual and accustomed grounds was one such communal property right pertaining to the tribe. *Whitefoot v. United States*, 293 F.2d 658, 663 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962); Juergensmeyer & Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem*, 14 Natural Resources J. 361, 372 (1974). To hold that the Indian negotiators intended to secure for each member of the tribe the right to compete for fish on equal terms as an individual with each individual settler—the state's view of the "in common with" clause as a prototype of the fourteenth amendment's equal protection clause—thus would be to disregard the fabric of Indian society at the time the treaties were concluded, a society of communality whose nature was reflected in the subsequent legal character of property ownership which evolved in Federal Indian law. *See* F. Cohen, *supra*.

In each treaty, two parties—the United States and a tribe—bargained on the basis of formal equality. An attempt to partition equitably rights which these parties were to hold in common must reflect this initial equality. The district court was not required to

decree a perfect 50-50 division of fishing opportunity. *Cf. Mahan v. Howell*, 410 U.S. 315, 332-33 (1973); *Swann v. Adams*, 385 U.S. 440, 444 (1967); *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The court itself recognized the difficulty in practice of attaining that theoretical ideal. 384 F.Supp. at 343-44. Nevertheless, a 50-50 apportionment reflects the equality existing between the two bargaining parties and best effectuates what the Indian parties would have expected if a partition of fishing opportunities had been necessary at the time of the treaties. Thus the court's apportionment was well within its discretion.

"Equitable Adjustment"

Today, the treaty Indians' "usual and accustomed" fishing grounds in general are located upstream from sites of intensive non-treaty Indian fishing. Because the parties to the treaties did not anticipate shortages of harvestable fish, they did not foresee that downstream fishing by non-Indians would someday injure the Indians' right to fish at their usual places. Therefore, the Indians are entitled to catch 50 percent not simply of the fish passing the traditional grounds, but also of those destined for those grounds but captured dowstream or in marine waters.

The district court acknowledged the difficulty in determining with mathematical precision the number of fish bound for the tribes' fishing areas. The court recognized that a large portion of these fish are taken outside the jurisdiction of the state. Furthermore, many caught within Washington waters are taken under regulations issued by the International Pacific Salmon Fisheries Commission. On the other hand, it is reasonable to suppose that many fish appropriated beyond the state's regulatory jurisdiction are nonetheless taken by Washington citizens.

The court decreed:

> An additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas closely adjacent to but beyond the territorial waters of the State, or outside the jurisdiction of the State, although within Washington waters.

384 F.Supp. at 344. We agree with the state that the court's equitable discretion does not extend so far as to permit it to compensate the tribes for the unanticipated heavy fishing by foreign ships off the coast. The treaty granted equal rights at the traditional areas to Washington citizens, and their ability to fish is equally impaired by foreign fishing. On the other hand, Washington citizens who benefit from marine catches of fish bound for traditional areas, regardless of whether they are subject to state regulation while fishing, have received a portion of the non-treaty Indian entitlement under the treaty. The court therefore may act within its equitable discretion by adjusting the number of fish which the treaty Indians have an opportunity to catch in such a way as to reflect roughly the fact that non-treaty Indian citizens have already received a portion of their share of the run past the treaty sites even before the state obtained jurisdiction over their activities.

Insofar as the 1937 convention between the United States and Canada for the protection of the Fraser River fish runs, 50 Stat. 1355, the Sockeye Salmon or Pink Salmon Fishing Act of 1947, enacted pursuant to the convention, 16 U.S.C. §§ 776-776f, and regulations issued thereunder displace the regulatory powers of the state within the state's territorial waters, fishing within those waters should be treated no differently from fishing beyond the state's territorial jurisdiction. The court therefore may adjust equitably the treaty Indians' share to compensate them for fish taken by other Washington citizens under regulations issued by the International Pacific Salmon Fisheries Commission which otherwise would be available for harvest at their traditional treaty areas. The court may so adjust the tribes' allocation to compensate, of course, only those tribes which share in the harvest of Fraser River salmon—or other fish affected by the Commission's regulations—at their traditional areas. Losses in the catch of those fish not regulated by the Commission caused by Commission regulation of fishing gear may also be compensated.

We reject the state's contention that the Convention and Act have "pre-empted" Indian treaty rights to harvest Fraser River salmon. The Supreme Court has indicated its extreme reluctance to find congressional abrogation of Indian treaty rights in the absence of explicit statutory language so directing. *Menominee Tribe of*

Indians v. United States, 391 U.S. 404 (1968). Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulations, but, in the absence of an explicit expression of intent to terminate treaty rights, losses to other citizens sustained through compliance with those regulations should be redressed as above stated by adding to the treaty Indians' permitted catch in areas under state jurisdiction.

Fish Taken on Reservations

The state contends that fish caught by treaty Indians on their reservations should be included in their 50 percent allocation of the catch. Analysis of the structure of a typical treaty, the Treaty of Medicine Creek, 10 Stat. 1132, is instructive. In Article I, the Indians ceded their lands to the United States. In Article II, however, the treaty reserved "for the present use and occupation of the said tribes and bands, the following tracts of land. . . ." Finally, in Article III, "[t]he right of taking fish, at all usual and accustomed grounds and stations, is *further* secured to said Indians, in common with all citizens of the Territory. [Emphasis added]"

The right to take fish in common with the settlers off the reservations was a right reserved by the Indians in addition to their right to occupy and use reservation land. The settlers obtained no analogous rights on the reservations. Other citizens clearly have no more claim to a share of the fish caught on the reservations than they do to a right to reside on those reservations. The court thus did not abuse its discretion in excluding fish caught on the reservations from the apportionment.

We also affirm its decision, uncontested by the state, that fish taken off the reservation and actually used for traditional tribal ceremonies or for personal subsistence consumption by members of the tribe and their families shall not be counted in the apportionment.

Lummi Reef Net Fishing

The conflict between the Lummi Tribe and the non-treaty Indian reef net fishermen involves elements not found among the other tribes. Reef nets are installed at various locations in the

sound, parallel to the shoreline from about 125 to about 1,300 yards from shore.[5] Locations differ greatly in their productivity. The technique of reef net fishing was developed by the Indians, who used nets between reefs close to shore. Modern reef netting is far more sophisticated, making use of artificial "reefs" and heavy equipment, and is practical in deeper waters farther from shore. The court found that the fish had been driven from shallower waters by the whites' use of fish traps, now illegal, and by the widespread use of other fishing gear in the areas formerly devoted to Indian reef nets.

Reef net fishermen by gentlemen's agreement retain exclusive occupancy of a given location until they sell or otherwise dispose of their equipment. The court found that all Lummi reef net fishermen had been squeezed out of the fishery. At present, therefore, a member of the Lummi Tribe can reef net in a profitable location only by purchasing, at considerable expense, a non-treaty Indian's fishing gear.

The district court found that the present reef net areas are within the usual and accustomed grounds and stations of the Lummi Indians, and that the Lummis had a right to an opportunity to fish in those areas. The court, however, deferred for later consideration the specific relief to be afforded the Lummis at the expense of present occupants of reef net locations.

Reef net fishing is distinguishable from other forms of fishing in two important respects. First, only a finite number of profitable positions are available, each occupied at present by a white fisherman who is recognized by his fellow fishermen as owning a quasi-property interest in the site, an interest appurtenant to his ownership of his fishing gear. Any assignment of positions to treaty Indian fishermen must break down the present exclusive occupancy system. Second, and more important, the court found that:

> Reef net locations were owned [at the time of the treaty] by individuals who claimed proprietary rights by virtue of inheritance in the male line. These locations constituted very valuable properties to their native owners. . . . Some of the Lummi signers of the treaty were owners of reef net loca-

[5]This fact was determined from inspection of the aerial photos admitted by the District Court as exhibits RN 7 and RN 11.

> tions. Lummi Indians who were present at the Point Elliott Treaty Council later asserted that the Lummi signers had received assurances there that they would continue to hold the rights to their fishing grounds and stations, including their reef net locations.

384 F. Supp. at 361. The right to fish with reef nets was thus not a tribal right, as was other fishing, but one guaranteed to specific individuals.

The individual Indian's proprietary relationship with a specific reef net location presents an aberration from the general communal pattern of Indian property ownership. Nevertheless, the Treaty of Point Elliott must be interpreted with reference to the general pattern of ownership among the tribes subscribing to it, not to the aberrational.

The fact that, in general, Indians held property communally has led the courts to hold that property rights, vis-a-vis the United States, are vested in the tribe, not in the individual. Disputes among members of the tribe are left for the tribe to adjust internally. *See Whitefoot v. United States*, 293 F.2d 658, 661-63 & nn. 8 & 9 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962).[6] In *Whitefoot*, for example, scarcity of good fishing locations at Celilo Falls on the Columbia river presented a similar situation. There, also, individual Indians had exercised an exclusive, hereditary right to fish certain choice locations. Nevertheless, the Court of Claims held that damages for inundation of the falls by federal construction of a dam were recoverable only by the tribe, not by individual tribal members. Similarly, no matter how Lummi fishermen held reef net locations according to tribal custom, so far as the United States is concerned, under the treaty the right to engage in reef net fishing belongs to the Lummi tribe. Therefore, fishing in the usual and accustomed reef net areas is subject to the same principle of equal division as is that in other usual and accustomed areas.

[6]The concept of "property" can scarcely exist outside a legal framework. We are reluctant to force whatever notions of rights and duties regarding fishing locations were held by Indians in 1854 into an Anglo-American mold of "property rights." We are especially reluctant to do so when the tribe still exists with which we can deal as an intermediary, allowing it to arbitrate among the conflicting claims of its members according to the values and customs of their own culture.

The non-Indian reef net fishermen maintain that today's fishing areas are not part of the Lummis' usual and accustomed areas. They assert that present reef netting is conducted in deeper water than that fished by the Lummis before the treaty was signed. The court, on the other hand, found that some present-day reef net gear is located directly upon traditional sites. It held that the "Lummi Tribe continues to hold treaty-secured rights to fish with reef net gear in its usual and accustomed places, including Legoe Bay off Lummi Island . . . ." 384 F. Supp. at 404. The court also found that:

> Since the turn of the century, the heavier volume of fish in the vicinity of Legoe Bay traveled close to shore. This has changed so that now fish must be taken in deeper water. This has been caused by the installation of traps [until they became illegal under state law] and the present abundance of other fishing gear in the reef net area. . . . In aboriginal times, Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time, including operation of the reef nets.

Id. at 361-62. Insofar as the district court thus concluded that usual and accustomed grounds and stations extended a sufficient distance from shore into Legoe Bay to enable the Indians to harvest most productively the available fish, that finding is not clearly erroneous. The term "grounds" as used in the treaties denotes a broader dimension than "stations" and can readily be understood to include the distances from shore at which present reef netting is done.

In fashioning equitable relief for the Lummis, the district court should give regard wherever practicable to minimizing the resulting hardship to present white reef net fishermen.

Muckleshoot Tribe

The Muckleshoot Indian Reservation, named after the prairie on which it is located, was established in 1857, two years after the treaties were signed. It was occupied by Indians who earlier

had been represented at Medicine Creek and at Point Elliott, as well as by some Indians who apparently were parties to neither of those treaties. The reservation was an arbitrary grouping; no Muckleshoot Tribe had previously existed. Nevertheless, the inhabitants of the reservation today are recognized as a tribe by the United States. The district court recognized the Muckleshoots as a treaty tribe. We agree.

The state refused to recognize membership in the tribe as conferring federal treaty rights. The Washington Supreme Court has held that a member of the Muckleshoot Tribe must establish that he is descended from a tribe or band which was represented at the signing of one of the treaties if he is to be accorded treaty rights. *State v. Moses,* 70 Wash.2d 282, 422 P.2d 775, *appeal dismissed,* 389 U.S. 428 (1967).

The Interior Department instructed Governor Stevens "to effect [if possible] the combination of all the Bands into six or eight Tribes, [and] to arrange half a dozen treaties or less, so that every one of the Tribes shall be a party to one of them." Exhibit USA 28. In the Treaty of Medicine Creek, 10 Stat. 1132, the tribes ceded all the land from the divide between the Puyallup and Duwamish rivers south to the Skookumchuck river, from the Sound to the crest of the Cascades. In the Treaty of Point Elliott, 12 Stat. 927, they ceded the land from the northern boundary of the territory ceded at Medicine Creek north to the Canadian border. Governor Stevens clearly believed that, except for those lands designated as reservations, he had successfully acquired the territorial rights of all the tribes in that vast area; and the district court found that the government has consistently treated the present-day Muckleshoot Tribe as the successor in interest of those of its constituent tribes which had been represented in the two treaties.

The state's principal fear seems to be that members of the Muckleshoot Tribe will be able to use the traditional areas of all the merged tribes, affording them special rights. The argument is specious. The member of every tribe composed of smaller bands possesses rights similarly more extensive than those of any one of his direct ancestors. The treaty Indians are restricted to the opportunity to take up to 50 percent of the harvestable catch at traditional areas. Each Indian can fish at but one location

at a time, so the state's concern that he is accorded double the treaty rights to which he is entitled is unfounded.

Stillaguamish and Upper Skagit Tribes

The Stillaguamish and Upper Skagit Tribes were parties to the Treaty of Point Elliott, but today are not recognized as organized tribes by the federal government. Rights under the treaties vested with the tribes at the time of the signing of the treaties. Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights. Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure is a factual question which a district court is competent to determine. *Cf. Upper Chehalis Tribe v. United States,* 155 F. Supp. 226 (Ct.Cl. 1957). Once a tribe is determined to be a party to a treaty, its rights under that treaty may be lost only by unequivocal action of Congress. *Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968). Evidence supported the court's findings that the members of the two tribes are descendants of treaty signatories and have maintained tribal organizations. We therefore affirm the district court's conclusion that the Stillaguamish and Upper Skagit Tribes are entities possessing rights under the Treaty of Point Elliott.

Conclusion

The decision of the district court is affirmed in all respects, with the clarification that its "equitable adjustment" should not take account of fish caught by non-Washington citizens outside the state's jurisdiction. The case is remanded to the district court so that it may maintain continuing jurisdiction.

Affirmed and remanded.

BURNS, District Judge, concurring:

I concur, but I want to add a brief comment from the viewpoint of a district judge. As was suggested at oral argument, any decision by us to affirm also involves ratification of the role of the district judge as a "perpetual fishmaster." Although I recognize

that district judges cannot escape their constitutional responsibilities, however unusual and continuing duties imposed upon them, I deplore situations that make it necessary for us to become enduring managers of the fisheries, forests, and highways, to say nothing of school districts, police departments, and so on. The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-9-75—550

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

QUINAULT TRIBE OF INDIANS, et al.,

Intervenors-Plaintiffs,

vs.

STATE OF WASHINGTON,

Defendant-Appellee,

THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al.,

Defendants.

Order No.

74-2414, 2437, 2438, 2439, 2440, 2567, 2602, 2705

On Appeal from the United States District Court, for the Western District of Washington

Before: CHOY and GOODWIN, Circuit Judges, and BURNS,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Choy and Goodwin voted to reject the suggestion for rehearing en banc, and Judge Burns recommended rejection.

*The Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has voted to grant rehearing en banc. F.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

However, the opinion heretofore filed is amended in the following particulars:

1) Amend the last sentence of the first paragraph on page 3 of the slip opinion to read:

> "Organizations of commercial and sports fishermen intervened as parties defendant or participated as amici curiae."

2) Amend the sentence running from page 16 to page 17 to read:

> "Reef nets are installed at various locations in the Sound parallel to the shoreline from about 125 to about 1300 yards from shore."

3) Amend footnote 5, page 17, to read:

> "This fact was determined from inspection of the aerial photographs admitted by the district court as exhibits RN 7 and RN 11."

Filed July 23, 1975.
Docketed Aug. 4, 1975.

UNITED STATES of America, Plaintiff,
Quinault Tribe of Indians on its own behalf and on behalf of the Queets Band of Indians, et al., Intervenor-Plaintiffs,

v.

STATE OF WASHINGTON, Defendant,
Thor C. Tollefson, Director, Washington State Department of Fisheries, et al., Intervenor-Defendants.

Civ. No. 9213.

United States District Court,
W. D. Washington at Tacoma.

Feb. 12, 1974.

STATEMENT OF THE CASE

BOLDT, Senior District Judge.

In September, 1970 the United States, on its own behalf and as trustee for several Western Washington Indian Tribes,[1] later joined as intervenor plaintiffs by additional tribes,[2] filed the complaint initiating this action against the State of Washington. Shortly later the State Department of Fisheries (Fisheries) and the State Game Commission (Game), their respective directors, and the Washington Reef Net Owners Association (Reef Net Owners) were included as defendants. By state statute Fisheries is charged with exercising regulatory authority over fishing for all anadromous food fish. Regulation of anadromous steelhead trout is vested in Game. Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 concerning off reservation treaty right fishing within the case area by plaintiff tribes, which long has been and now is in controversy, and for injunctive relief to provide enforcement of those fishing rights as they previously have been or herein may be judicially determined. The case area is that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River

[1]Hoh Tribe; Makah Tribe, Muckleshoot Tribe; Nisqually Tribe; Puyallup Tribe; Quileute Tribe; Skokomish Tribe.

[2]Lummi Tribe; Quinault Tribe; Sauk-Suiattle Tribe; Squaxin Island Tribe; Stillaguamish Tribe; Upper Skagit River Tribe; Yakima Nation.

drainage area, and includes the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas.

Plaintiffs also assert claims for relief concerning alleged destruction or impairment of treaty right fishing due to state authorization of, or failure to prevent, logging and other industrial pollution and obstruction of treaty right fishing streams. Separation of those claims for pretrial and trial after trial of the issues determined in this decision was stipulated and approved by the court.

Venue is properly laid in this court under 28 U.S.C. § 1391(b). Jurisdiction is alleged as to all tribes under one or more of the following provisions: 28 U.S.C. §§ 1345, 1331, 1343,(3) and (4) and 1362.[3] All of these allegations were conceded by all defendants, subject to their contention that exclusive jurisdiction to hear and determine the issues in this case is in the Indian Claims Commission under 25 U.S.C. §§ 70-70v and Game's denial of jurisdiction as to the Puyallup Tribe. This court has previously held and hereby affirms that both of these contentions are without merit and denied. It is hereby found and held that jurisdiction and venue have been established in all particulars as detailed in Part One of the Final Pretrial Order.

Fisheries contends the Muckleshoot, Stillaguamish and Upper Skagit tribes do not hold a special treaty status to harvest anadromous fish. Game joins in this contention and makes the same contention regarding the Sauk-Suiattle Tribe. These contentions are considered and denied in the written Findings of Fact and Conclusions of Law.

Shortly after appearance in the action by all defendants the first of a considerable number of pretrial conferences was held. Among many preliminary matters considered at that time were the court's suggestions that so far as possible all tribes, agencies or organizations having or claiming direct or indirect justiciable interest in treaty fishing rights in this judicial district be brought into the case either as parties or as amicus curiae; and that every issue of substantial direct or indirect significance to the contentions of any party be raised and adjudicated in this case. Both suggestions were acceptable to all parties and to a great extent they have been put into

[3]See Final Pretrial Order paragraph 1.

effect. Thus every interested agency and organization not joined as a party has had an opportunity to present its views on any of the issues in the case.[4]

For more than three years, at the expenditure by many people of great time, effort and expense, plaintiffs and defendants have conducted exhaustive research in anthropology, biology, fishery management and other fields of expertise, and also have made extreme efforts to find and present by witnesses and exhibits as much information as possible that pertains directly or indirectly to each issue in the case. As a consequence of this extensive pretrial preparation, all parties joined in stipulating to a great many agreed facts which are stated in exhibits or included in the Final Pretrial Order. The Joint Biological Statement, Exhibit JX-2a, jointly proposed and admitted in evidence as agreed facts applicable as indicated therein, was prepared by and agreed to by highly qualified experts employed by and representing both plaintiffs and defendants and is of exceptional importance and practical value. It is believed considerable historic and scientific information never before presented in a case involving treaty rights is now recorded and may prove of value in later proceedings in this case and possibly in others.

To great advantage, all procedures recommended in the Manual for Complex Litigation have been followed by counsel in the particulars and to the extent found applicable and practicable by the court. With approval of court and counsel upon its entry the Final Pretrial Order became the final statement of all issues to be heard and determined in this decision, and pleadings pertaining to those issues passed out of the case, subject only to amendment by the court to prevent manifest injustice. Such amendments have been included in the text of the Final Pretrial Order.

Every attorney in the case has vigorously and effectively presented the particular interests and contentions of each client he represents to the maximum extent professional duty requires. On the other hand there has been a remarkable degree of highly respon-

[4]The following agencies or organizations have submitted, or concurred in written briefs: Idaho Fish & Game Department; Port of Seattle; Washington State Sportsmen's Council, Inc.; Northwest Steelheaders, Inc.; Committee to Save Our Fish; Tacoma Sportmen's Club, Inc.; Tacoma Poggie Club, Inc.; Purse Seine Vessel Owners Association.

sible and most commendable cooperation on the part of all counsel throughout trial preparation and trial which has greatly expedited discovery and full presentation of the issues and evidence in the case. All of the legal issues have been researched in depth and effectively presented and argued in the pretrial briefs, and in the final briefs submitted after the presentation of evidence was concluded and before final argument, which also was exceptional in professional quality. By direction of the court all parties either individually or jointly, as they chose, prepared and submitted proposed findings of fact and conclusions of law referenced to the record and also drafts of a proposed decree. Each proposed finding, conclusion and decree has been closely examined and considered by review of the evidence and the portions of the briefs pertaining to each item. All fact findings and legal rulings stated herein and the detailed Findings of Fact, Conclusions of Law and Decree signed and entered by the court are hereby made a part of this decision.

On January 11, 1974, when Game filed the final version of its proposed findings, conclusions and decree the issues tried were finally submitted for decision.

This court is confident the vast majority of the residents of this state, whether of Indian heritage or otherwise, and regardless of personal interest in fishing, are fair, reasonable and law abiding people. They expect that kind of solution to all adjudicated controveries, including those pertaining to treaty right fishing, and they will accept and abide by those decisions even if adverse to interests of their occupation or recreational activities.

More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. This has been inflamed by provocative, sometimes illegal, conduct of extremists on both sides and by irresponsible demonstrations instigated by non-resident opportunists.

To this court the evidence clearly shows that, in the past, root causes of treaty right dissension have been an almost total lack of meaningful communication on problems of treaty right fishing between state, commercial and sport fishing officials and non-Indian fishermen on one side and tribal representatives and members on the other side, and the failure of many of them to speak to each other

and act as fellow citizens of equal standing as far as treaty right fishing is concerned. Some commendable improvement in both respects has developed in recent years but this court believes high priorty should be given to further improvement in communication and in the attitude of every Indian and non-Indian who as a fisherman or in any capacity has responsibility for treaty right fishing practices or regulation. Hopefully that will be expedited by some of the measures required by this decision.

The ultimate objective of this decision is to determine every issue of fact and law presented and, at long last, thereby finally settle, either in this decision or on appeal thereof, as many as possible of the divisive problems of treaty right fishing which for so long have plagued all of the citizens of this area, and still do.

I. ESTABLISHED BASIC FACTS AND LAW

(Hereinafter italicize emphasis added unless otherwise indicated)

The first decision of the United States Supreme Court on Indian treaty rights, Cherokee Nation v. Georgia, 5 Pet. 1, 30 U.S. 1, 8 L.Ed. 25, was written by Chief Justice Marshall in 1831. Since then decisions on the same subject matter have been rendered in that court, other federal courts and state courts in a considerable number to the present time.[5] All of the decisions that appear to have direct or indirect application to the present case have been closely reviewed and analyzed, individually and in relation to each other. Based thereon this court finds and holds that the following statements are now well established in fact and law.

1. Art. VI, cl. 2 of the United States Constitution provides:

> The "Constitution . . . of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. To the great advantage of the people of the United States, not only in property but also in saving lives of citizens, and to expedite providing for what at the time were immediate and imperative national needs, Congress chose treaties rather than conquest as the

[5]The Table of cases appended hereto includes only all cases which have been cited by any party as authority pertaining to any issue in this case and other cases considered by the court. In the table, the abbreviated title of each case referred to in the decision is italicized.

means to aquire vast Indian lands. It ordered that treaty negotiations with the plaintiff tribes and others in the Northwest be conducted as quickly as possible. Isaac I. Stevens, Governor of Washington Territory, proved to be ideally suited to that purpose for in less than one year during 1854-1855 he negotiated eleven different treaties, each with several different tribes, at various places distant from each other in this rugged and then primitive area. The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.[6]

In 1899 the United States Supreme Court in considering a similar situation said:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. Worcester v. Georgia, 6 Pet. 515 [8 L.Ed. 483]; The Kansas Indians, 5 Wall. 737, 760 [18 L.Ed. 667]; Choctaw Nation v. United States, 119 U.S. 1, 27, 28 [7 S.Ct. 75, 30 L.Ed. 306, 314, 315] . . . . 'The language used in treaties with the Indians should never be construed to their prejudice.' . . . 'How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' "[7]

[6]Exhibit (Ex) USA-20, pp 24-29; Finding of Fact (FF) #2.

In 1905 the above principles were reiterated in *Winans* (198 U.S. p. 380, 25 S.Ct. p. 664):

> "And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.' [citing *Choctaw* and *Jones*]"

3. The United States Supreme Court in *Missouri* (252 U.S. p. 434, 40 S.Ct. p. 384) stated:

> "Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.' Baldwin v. Franks, 120 U.S. 678, 683, 7 S.Ct. 656, 32 L.Ed. 766."

4. Each of the basic fact and law issues in this case must be considered and decided in accordance with the treaty language reserving fishing rights to the plaintiff tribes, interpreted in the spirit and manner directed in the above quoted language of the United States Supreme Court. Each treaty in this case contains a provision substantially identical to that in the Medicine Creek treaty: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, . . ."[8]

> 5. "The right to resort to the [usual and accustomed] fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . [T]he treaty was not a grant of rights to the Indians but a grant of right from them—a reservation of those not granted."[9]
>
> "And surely it was within the competency of the Nation to

[7]*Jones*, 175 U.S. at 10, 11, 12, 20 S.Ct. at 5; other decisions by the same court containing the same or similar language: *Cherokee, Worcester, Kansas Indians, Winans, Kennedy, Seufert, Tulee.*

[8]Text of all treaties FF #1.

[9]U.S.Sup.Ct. in *Winans*, 198 U.S. at 381, 25 S.Ct. at 664.

secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' "[10]

6. ". . . [T]he [treaty] negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. . . . And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees."[11] That those rights are also reserved to the descendants of treaty Indians, without limitation in time, excepting as Congress may determine, has been recognized and applied by the United States Supreme Court from the first to the latest decision of that court involving Indian treaty fishing rights.

7. An *exclusive* right of fishing was reserved by the tribes within the area and boundary waters of their reservations,[12] wherein tribal members might make their homes if they chose to do so. The tribes also reserved the *right* to off reservation fishing "at all usual and accustomed grounds and stations" and agreed that "all citizens of the territory" might fish at the same places "in common with" tribal members. The tribes and their members cannot rescind that agreement or limit non-Indian fishing pursuant to the agreement. However, off reservation fishing by other citizens and residents of the state is not a *right* but merely a *privilege* which may be granted, limited or withdrawn by the state as the interests of the state or the exercise of treaty fishing rights may require.

8. The tribes reserved the right to fish at *"all* usual and accustomed grounds and stations." The words "grounds" and "stations" have substantially different meanings by dictionary definition and as deliberately intended by the authors of the treaty. "Stations" indicates fixed locations such as the site of a fish wier or a fishing

[10]Id. at 384, 25 S.Ct. at 665.

[11]Id. at 381-382, 25 S.Ct. at 664.

[12]This proposition is not denied or challenged by any party in this case. As previously stated in paragraph 4 of the text, the fishing clauses are substantially identical in the treaties of all plaintiff tribes. The fishing clause in the Yakima treaty applies the word "exclusive" to on reservation fishing. Although the word is used in the same context in several other treaties not involved in this case it does not appear in the treaty of any other plaintiff tribe. However, in every case involving a fishing clause substantially similar to that quoted in the text of this decision in which "exclusive" is not present, without exception the United States Supreme Court has assumed that on reservation fishing *is* exclusive and has interpreted and applied similar fishing clauses, as though the word "exclusive" was expressly stated therein as in the Yakima treaty. Research has not disclosed any reported decision to the contrary.

platform or some other narrowly limited area; "grounds" indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined. "Usual and accustomed," being closely synonymous words, indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions. Therefore, the court finds and holds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.[13]

II. SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

This summary of the 253 separate detailed Findings of Fact and 48 Conclusions of Law filed herewith is intended as a recital of only the principal categories thereof, several of which are discussed elsewhere in this opinion.

The Findings of Fact set forth the treaties under which each tribe, or its predecessors, negotiated with the United States, and in which the Indians expressly reserved the right to fish at off reservation usual and accustomed fishing places. The pretreaty role of fishing among Northwest Indians is outlined, emphasizing the universal importance of the fishery resource, particularly salmon and steelhead, to Indians in the case area as an element of diet and in religious practices and trade. The Northwest Indians developed a wide variety of fishing methods which they utilized to catch many varieties of fish at innumerable locations throughout the areas where they lived and traveled.

In the mid-1850's the United States treated with the unlettered Northwest Tribes to acquire great expanses of land. Reluctant to be confined to small reservation bases, the Indian negotiators insisted that their people continue to fish as they had beyond the reservation boundaries. There is no indication that the Indians intended or

[13]*Seufert* and see F.F. 10 and 13.

understood the language "in common with all citizens of the Territory" to limit their right to fish in any way. For many years following the treaties the Indians continued to fish in their customary manner and places, and although non-Indians also fished, there was no need for any restrictions on fishing.

For each of the plaintiff tribes, the findings set forth information regarding the organization and membership of the tribe, and some, but by no means all, of their principal usual and accustomed fishing places. Anthropological data are also presented for several tribes, as well as information concerning present Indian culture and economy. Several tribes are currently involved in fish propagation programs which benefit the tribes and the state.

Fact findings are also presented regarding reef net fishing which show that current non-Indian reef net operations take place at or near the same locations occupied historically by Lummi Indian fishermen.

General fisheries conservation and management data are presented, incorporating the Joint Biological Statement which sets forth many significant facts concerning anadromous fish. Procedures and objectives are outlined for managing salmon and steelhead for commercial, sport and Indian user groups including regulatory schemes promulgated by state authorities and by Indian tribes. The means and locations used to harvest the resource and the quantity of the harvest are also presented.

The policies and practices of both Fisheries and Game are also presented. Due in part to the nature of the species of fish regulated, Fisheries evidences better success in managing the salmon than does Game with regard to steelhead. Fisheries has also evidenced an attitude of cooperation with the plaintiff tribes that has been lacking from Game, at least prior to *Puyallup-II*.

The Conclusions of Law, after stating the basis of jurisdiction and venue, establish the treaty status of each of the plaintiff tribes, and therefore, the right of their members to fish off reservation in common with the citizens of the state. The fishing right was reserved by the Indians and cannot be qualified by the state. The state has police power to regulate off reservation fishing only to the extent reasonable and necessary for conservation of the resource. For this purpose, conservation is defined to mean per-

petuation of the fisheries species. Additionally, state regulation must not discriminate against the Indians, and must meet appropriate due process standards.

The Yakima Nation and the Quinault Tribe are presently qualified to self-regulate the off reservation fishing of their tribal members. Other tribes may similarly self-regulate member fishing if and when they meet the qualifications and conditions set forth in the decision.

Several current state laws and regulations which restrict the time, place, manner and volume of off reservation fishing by treaty tribes, and reserve game fish for sport interests, have not been established as reasonable and necessary for conservation and the application thereof to plaintiff tribes is unlawful. The court will retain continuing jurisdiction of this case to grant such further relief as the court may find appropriate.

III. STATE REGULATION OF OFF RESERVATION TREATY RIGHT FISHING

There is neither mention nor slightest intimation in the treaties themselves, in any of the treaty negotiation records or in any other credible evidence, that the Indians who represented the tribes in the making of the treaties, at that time or any time afterward, understood or intended that the fishing rights reserved by the tribes as recorded in the above quoted language would, or ever could, authorize the "citizens of the territory" or their successors, either individually or through their territorial or state government, to qualify, restrict or in any way interfere with the full *exercise* of those rights. All of the evidence is overwhelmingly to the contrary, particularly in the vivid showing in the record that the treaty Indians pleaded for and insisted upon retaining the *exercise* of those rights as essential to their survival. They were given unqualified assurance of that by Governor Stevens himself without any suggestion that the Indians' *exercise* of those rights might some day, without authorization of Congress, be subjected to regulation by non-Indian citizens through their territorial or state government.[11]

For several decades following negotiation and ratification of the treaties all of the tribes extensively exercised their treaty rights by

[11] Ex. USA-20 pp 24-29, 42-43; FF #2.

fishing as freely in time, place and manner as they had at treaty time, totally without regulation or any restraint whatever, excepting only by the tribes themselves in strictly enforcing tribal customs and practices which, during that period and for innumerable prior generations, had so successfully assured perpetuation of all fish species in copious volume. The first other than naturally caused threat to volume or species came from non-Indian population growth and non-Indian industrial development in the rapid westward advance of civilization.[15]

In the final pretrial order in this case issues were raised therein by the contentions of several tribes later joined by the remaining plaintiff tribes that: (a) the state police power dicta followed by the United States Supreme Court are not sound in legal logic or principle, and (b) even if so, state regulation of the exercise of Indian off reservation treaty fishing rights must be denied in "justice and reason, looking to the substance of the rights reserved as understood by the Indians who negotiated the treaties, without regard to technical rules," as all American courts for a century or more have been repeatedly admonished by the United States Supreme Court in the same or similar language.[16]

In addition to raising the above stated issues in the final pretrial order, the tribes have submitted well researched briefs and vigorous oral argument in support thereof. That the contentions are not without at least color of merit in judicial and scholarly support is shown by a decision of the Supreme Court of Idaho,[17] the judicial views of at least one highly respected Washington State Supreme Court Judge[18] and a scholarly article in The University of Washington Law Review written by a Law Professor of that University and other similar articles.[19]

No federal decision or state decision cited to this court has directly and specifically interpreted the clause "in common with all citizens of the Territory" as, in itself, directly or impliedly justifying

[15]Ex. USA-20, pp 39-42; FF # 2.

[16]See footnote 7.

[17]*Author.*

[18]Donworth dissenting in *McCoy* (p. 439, 378 P.2d 942) and *Game-I* (70 Wash.2d p. 263, 422 P.2d 754); and in *Satiacum* (50 Wash.2d p. 529, 314 P.2 400) a 4-4 decision.

[19]R. Johnson, 47 U.Wash.L.Rev. 207 (1972); C. Hobbs, 37 Geo.Wash. L.Rev. 1251 (1969); Comment, 59 U.Calif.L.Rev. 485 (1971).

state police power regulation of off reservation treaty right fishing, or has specifically stated or even indicated any federal source of or basis for such state power.

Under these circumstances and the facts hereinabove recited, judicial integrity requires that this court must give the tribes' above stated contentions serious consideration and specific determination.

The first decision of the United States Supreme Court, later cited by the same court as authority for state regulation of treaty right fishing, is *Ward*. On that subject unquestionably the decision was obiter dictum because: (a) the Indian hunting rights reserved in the treaty in question were limited to specifically designated areas outside of which Race Horse hunted, for which he was imprisoned and from which he sought enlargement by habeas corpus; and (b) because later in the opinion it was held the treaty hunting rights in question had been finally terminated by Congress prior to the allegedly criminal hunting by Race Horse.

The only statement in *Ward* in either the majority or minority opinions that could possibly justify later citation of the decision as applicable to treaty right fishing was the single sentence 163 U.S. on page 507, 16 S.Ct. on page 1076:

> "The power of a state to control and regulate the taking of game cannot be questioned. Geer v. Connecticut, 161 U.S. 519, [16 S.Ct. 600, 40 L.Ed. 793]."

However, in the next preceding paragraph of the majority opinion in *Ward* two sentences before the sentence just quoted, the majority opinion stated:

> ", . . . the sole question which the case presents is whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege, therein (the treaty) referred to within the limits of the state of Wyoming in violation of its laws. If it [the treaty] gave such right, the mere fact that the state had created school districts or election districts, and had provided for pasturage on the lands, could no more efficaciously operate to destroy the right of the Indian to hunt on the lands *than could passage of the* [*state*] *game law.*"

This statement, even if it too be a dictum, is far more sound in treaty law applicable to fish and game regulation than the first statement quoted above.

Thus the second statement in *Ward*, quoted in the paragraph

above to the effect that exercise of treaty right hunting cannot be controlled by state regulatory laws would appear to be compelling, or at least equal, authority for denying state regulation, not authorized by Congress, of Indian fishing off reservation as specified in existing treaties which expressly record and recognize reservation of that right by the Indian tribes.

In *Geer*, Mr. Justice White, speaking for a 5-2 majority traced in detail principles pertaining to the taking of *ferae naturae* down through the ages from Solon of ancient Athens to 1895, but treaty rights were not involved in that case or even mentioned in any way whatever in the exhaustive opinion. The only issue decided in *Geer* was the holding that it was not unconstitutional for Connecticut to allow, by regulation, killing of birds within the state during a designated open season, and to permit such birds, when so killed, to be used, sold and bought for use within the state, but forbid their transportation beyond the state. Hence the statement in *Geer* as well as that in *Ward*, on the subject of off reservation treaty right fishing, were both purest dicta.

Ward was not cited in *Winans*, wherein state power to regulate off reservation treaty fishing was assumed without any explanation or citation of authority. That subject was mentioned only in the concluding clause of a sentence (198 U.S. p. 384, 25 S.Ct. p. 665):

> ". . . nor does it [the right to take fish] restrain the state unreasonably, if at all, in the regulation of the right."

Geer, *Ward*, *Patsone* and *Lacoste* are cited in footnote #2 of *Tulee* (315 U.S. p. 683, 62 S.Ct. 864) as supporting the only statement in that opinion referring to the state power to regulate off reservation fishing:

> "Relying upon its broad powers to conserve game and fish within its borders, (2) however, the state asserts that its right to regulate fishing may be exercised at places like the scene of the alleged offense, which, although within the territory originally ceded by the Yakimas, is outside of their reservation."

In *Patsone* the United States Supreme Court reviewed the conviction of an alien for possession of a shotgun in violation of a state criminal statute. One of the two defenses presented and determined in the decision was based on provisions of a United States treaty with Italy. The treaty provisions and facts in *Patsone* are totally dissimilar to those in the present case and nothing in the

holdings or language in the opinion directly or by implication would legally authorize state regulation of a federally guaranteed civil right which is expressly stated in a treaty and the exercise of which right could not possibly endanger the personal safety of any resident of the State.

Treaty rights were in no way involved in *Lacoste*. The only statement in that decision (263 U.S. p. 549, 44 S.Ct. 186) concerning state police power to regulate the taking of wild animals is supported by citation of *Geer*, *Ward*, *Kennedy* and other decisions having only remote applicability in either fact or law to the present case.

The remaining treaty right fishing decisions of the United States Supreme Court are *Puyallup-I* and *Puyallup-II*. Thus until *Puyallup-I* was decided in 1968 there was neither judicial analysis nor citation of a non-dictum decision supporting police power state regulation of the exercise of Indian off reservation treaty right fishing in any Supreme Court decision because all previous Supreme Court references to that subject were either based solely on the reiterated dicta discussed above or assumed such authority without discussion of its basis or indication of its source.

In support of a statement in *Puyallup-I* (391 U.S. p. 399, 88 S.Ct. 1725) concerning state regulation of treaty fishing outside of reservations the United States Supreme Court cited *Winans* and *Kennedy* as forerunners of *Tulee* and quoted portions of all three. As indicated above herein, the *Tulee* and *Winans* quotations were dicta.

In *Kennedy*, a habeas corpus proceeding, Indian lands were transferred by the Seneca Tribe to private ownership in a 1797 treaty containing a provision which permitted the Seneca Indians to fish in waters on the lands conveyed "at will, and at all seasons of the year, regardless of the provisions of the game laws of the State of New York." Shortly after that conveyance the lands were resold and continued in private ownership to the time of *Kennedy*, decided in 1915. That decision cites *Geer* and *Ward* as the sole basis for its statement (241 U.S. p. 562, 36 S.Ct. p. 707) that "it is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the state . . . ." *Kennedy* paraphrases *Winans* for more than *Winans*

held and quotes the same passing reference to regulation in *Winans* previously quoted above.[20] Most significant of all, it is stated in the very *Kennedy* language quoted in *Puyallup-I* (391 U.S. pp. 399-400, 88 S.Ct. p. 1729) that the fishing clause in the treaty conveyance "is fully satisfied by considering it a reservation of a *privilege* of fishing . . ." subject to state regulation. If at this time anything concerning treaty fishing rights should be beyond doubt or question it is the basic principle that the treaty fishing of plaintiff tribes in this case is a reserved *right* and not a *mere privilege*. The treaty fishing in *Kennedy* was held to be only a *privilege* under the peculiar facts of that case. Nothing faintly comparable to those facts can be found in either *Puyallup-I* or the present case.

Another statement in *Puyallup-I* (391 U.S. p. 398, 88 S.Ct. p. 1728) concerning police power regulation, without analysis other than as stated therein, or citation of a non-dictum authority, is:

> "Moreover, the right to fish at those respective [usual and accustomed] places is not an exclusive one. Rather it is one 'in common with all citizens of the territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State."

This statement seems to say that because a state has police power to regulate fishing *privileges* which the state has granted and may limit or entirely withdraw, that is somehow a legal reason for state regulation of federal fishing *rights* which are expressly reserved in a treaty which only Congress has authority to limit or modify. If that seeming non sequitur be the law it certainly is deserving of more specific legal analysis and justification than it has ever had in any United States Supreme Court decision.

In *Puyallup-I* it is also stated (391 U.S. p. 398, 88 S.Ct. p. 1728):

> "The *right* to fish 'at all usual and accustomed' places *may, of course, not be qualified by the State*, even though all Indians born in the United States are now citizens of the United States. [citations] But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

[20]". . . nor does it restrain the state unreasonably, if at all, in the regulation of the right." (198 U.S. p. 384, 25 S.Ct. p. 665)

That a treaty *right*, guaranteed as the supreme law of the land by the Federal Constitution, can not be "qualified" (i.e. "in some way limited or modified")[21] by a state but the *exercise* of the right may be limited or modified by state regulation, especially when these seemingly conflicting propositions are stated in consecutive sentences, is very difficult to comprehend. The practical effect of a difference between *having* a constitutional right but only a limited right to *exercise* it certainly could not have been understood and accepted by the "unlettered" Indians who negotiated the treaties and it must be little less impossible for their somewhat more sophisticated present-day descendants to comprehend and accept.

Mindful that treaty fishing is a right, not a mere privilege, the following sentence from *Murdock*, quoted in a footnote (p. 402, 88 S.Ct. p. 1730) of Puyallup-I, seems pertinent:

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

As stated by the United States Supreme Court in *Winans* (198 U.S. pp. 381-382, 25 S.Ct. 662), treaty fishing rights are personal rights held and exercised by individual tribe members. Although the exercise of that particular civil treaty right may be limited or modified in any particular or to any extent by or with authority of Congress,[22] that the exercise of such a right may be limited in any way by the police power of a state, without having previously received authority to do so from Congress, seems to be diametrically opposed to relevant treaty law and personal civil rights decisions, particularly those of recent years.

In the *Puyallup-II* decision, decided less than three months ago, it was stated (414 U.S. p. 2, 94 S.Ct. p. 332):

> "The sole question tendered in the present cases concerns the regulations of the Department of Game concerning steel head trout."

Other than by recital or quotations from *Puyallup-I* and State Supreme Court decisions, in *Puyallup-II* there was no discussion of or ruling upon the basis of state police power to regulate off reservation treaty right fishing unless it be derived from the next to the

[21]Webster's Third New International Dictionary of the English Language, 1961 Ed. (p 1858)

[22]*Lone Wolf* citing other Supreme Court decisions to the same effect.

last paragraph in the opinion of Justice Douglas (pp. 5-6, 94 S.Ct. p. 333):

> "We do not imply that these fishing rights persist down to the very last steel head in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steel head from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets."

Whatever the above quoted statement may have added to or taken from the right to exercise the off reservation treaty fishing rights of the plaintiff tribes, to the present time there never has been either legal analysis or citation of a non-dictum authority in any decision of the Supreme Court of the Land in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties which the federal Constitution mandates must be considered and applied as "the supreme Law of the Land."

From the above summary of the United States Supreme Court decisions it is clear the following 1971 comment by the Washington State Supreme Court[23] is not overstated:

> "Surprisingly little judicial attention, we note, has been given to this rather standard treaty language [in the fishing rights clause of Indian treaties]."

It also appears that the United States Supreme Court has exercised a prerogative specifically reserved by and to Congress in the treaties. Congress has never exercised its prerogative to either limit or abolish Indian treaty right fishing. In recent years it declined to do the latter by three times failing to enact proposed legislation for the termination of Indian treaty fishing rights.[24] It may be that the refusal or failure of Congress to exercise a specific prerogative, by enactment of legislation, would legally justify judicial exercise of that particular prerogative. If so, it has never been stated or indicated in any United States Supreme Court decision as the basis

[23]*Moses-II*, 79 Wash.2d at p. 108, 483 P.2d p. 834.

[24]H.R.J. Res. 698, 87th Cong., 2d Sess. (1962); H.R.J.Res. 48, 88th Cong., 1st Sess. (1963); S.J.Res. 170 & 171, 88th Cong., 2d Sess. (1964) All have died in committee.

or source of authority for the federal judicial decisions authorizing state regulation of off reservation treaty fishing rights.

Since Congress has the power to qualify or revoke any treaty or any provision thereof,[25] unquestionable federal authority is available to provide federal regulation, or to authorize state regulation, for the protection of fishery resources against any threatened or actual harm that might arise from off reservation treaty right fishing by tribal members limited *only* by tribal regulation.[26] In these circumstances it is unfortunate, to say the least, that state police power regulation of off reservation fishing should be authorized or invoked on a legal basis never specifically stated or explained. This is particularly true because state regulation of off reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future.

Having the judicial duty to independently research, consider and fairly appraise the tribes' contention concerning state regulation of off reservation treaty right fishing, this court has intended and attempted to do that as conscientiously and thoroughly as possible within the personal capabilities of the author of this decision. The results of that effort are above stated as directly and briefly as the subject matter appeared to permit.

In the opinion of this court, judicial integrity also requires this court to hold that the tribes' contention that the state does not have legal authority to regulate the exercise of their off reservation treaty right fishing must be and hereby is denied by this court. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge, despite academic or personal misgivings, to enforce and apply every principle of law as it

[25]See footnote 22.

[26]With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

Unfortunately, insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this court.

is directly stated in a decision of the United States Supreme Court. Recently the United States Supreme Court in *Puyallup-I* and *Puyallup-II* directly and specifically held that Washington has the power to regulate off reservation treaty right fishing in the particulars and to the extent indicated in those decisions, which holding continues in effect unless and until overruled or modified by that court or by Congress. Accordingly, each of the rulings on specific issues in this case stated in Section IV of this decision has been considered and determined on that basis.

IV. RULINGS ON MAJOR ISSUES IN THIS CASE

1. In the detailed Findings of Fact and Conclusions of Law on file herein this court has found and held and hereby reaffirms that each of plaintiff tribes in this case, including each of the tribes whose status as such was challenged by some or all defendants, has established its status as an Indian tribe recognized as such by the federal government and therefore is entitled to maintain this action for relief based on a treaty of the United States negotiated by and for the tribe, its members at that time and their descendants.

An appeal from a district court decision holding that the Puyallup reservation no longer exists has not yet been determined. However, in *Menominee* (1968) the United States Supreme Court held that termination of a tribal reservation established pursuant to a treaty did not extinguish hunting and fishing rights, reserved in the treaty by implication, or impair the exercise of such rights within the area of the terminated reservation. In the opinion of this court, treaty right fishing within the area of a former Indian reservation cannot be *exclusive* when that reservation no longer exists, but such fishing must be "in common with" non-treaty right fishermen. It is so found and held and hereby shall be applicable to any plaintiff tribe, the reservation of which has been or hereafter may be terminated.

2. Ever since the first Indian treaties were confirmed by the Senate, Congress has recognized that those treaties established self-government by treaty tribes, excepting only as limited in the treaties, judicial interpretation thereof or by Congress. This basic principle was confirmed in the first United States Supreme Court decision dealing with such a treaty[27] and has always been expressly or

[27]*Cherokee*, 30 U.S. p. 15 et seq. (1831)

impliedly reaffirmed when applicable in every succeeding decision of that court. There was a period during which Congress enacted legislation limiting the exercise of tribal autonomy in various particulars. However, in the last decade Congressional legislation has definitely been in the contrary direction, notably in the socalled "Indian Civil Rights Act."[28] Among other measures in that Act encouraging the exercise of tribal autonomy are those providing for enlarged jurisdiction of tribal courts, pursuant to which special training of tribal judges and other court personnel has been in progress for some time and still continues.

These measures and others make plain the intent and philosophy of Congress to increase rather than diminish or limit the exercise of tribal self-government.

The right to fish for all species available in the waters from which, for so many ages, their ancestors derived most of their subsistence is the single most highly cherished interest and concern of the present members of plaintiff tribes, with rare exceptions even among tribal members who personally do not fish or derive therefrom any substantial amount of their subsistence. The right to fish, as reserved in the treaties of plaintiff tribes, certainly is the treaty provision most frequently in controversy and litigation involving all of the tribes and numerous of their individual members for many years past.

The philosophy of Congress referred to above and the evidence in this case as a whole clearly indicate to this court that the time has now arrived, and this case presents an appropriate opportunity, to take a step toward applying congressional philosophy to Indian treaty right fishing in a way that will not be inconsistent with *Puyallup-I* and *Puyallup-II* and also will provide ample security for the interest and purposes of conservation.

In all the circumstances shown by the evidence, including those briefly sketched above, this court hereby finds and holds that any one of plaintiff tribes is entitled to exercise its governmental powers by regulating the treaty right fishing of its members without any state regulation thereof; PROVIDED, however, the tribe has and maintains the qualifications and accepts and abides by the conditions stated below. If, as to any plaintiff tribe, any one

[28]Pub.L. #90-284 Title II-VII; 82 Stat. pp. 77-81 (1968)

of such qualifications and conditions is not determined by the court in this decision on the evidence in this case, establishment of the qualifications and conditions of each other plaintiff tribe shall be determined either to the satisfaction of both Fisheries and Game, or upon hearing by or under direction of the court. When the qualifications and conditions of a tribe have been fully established in the manner indicated, that tribe shall be relieved of state regulation except to the extent specified in the below stated conditions. Failure of a tribe either to maintain its required qualifications or to abide by and adhere to prescribed conditions, when established and not promptly corrected, shall suspend self-regulation by such tribe until such time as all required qualifications and conditions are fully established.

To qualify for self-regulation of off reservation treaty right fishing as above provided, a tribe must establish to the satisfaction of either Fisheries and Game or the court, that the tribe has each of the following qualifications and that the tribe will accept and abide by each of the following conditions.

QUALIFICATIONS

The tribe shall have:

(a) Competent and responsible leadership.

(b) Well organized tribal government reasonably competent to promulgate and apply tribal off reservation fishing regulations that, if strictly enforced, will not adversely affect conservation.

(c) Indian personnel trained for and competent to provide effective enforcement of all tribal fishing regulations.

(d) Well qualified experts in fishery science and management who are either on the tribal staff or whose services are arranged for and readily available to the tribe.

(e) An officially approved tribal membership roll.

(f) Provision for tribal membership certification, with individual identification by photograph, in a suitable form that shall be carried on the person of each tribal member when approaching, fishing in or leaving either on or off reservation waters.

CONDITIONS

The tribe shall:

(a) Provide for full and complete tribal fishing regulations which, before adoption, have been discussed in their proposed final form with Fisheries and Game, and include therein any state regulation which has been established to the satisfaction of the tribe, or upon hearing by or under direction of this court, to be reasonable and necessary for conservation.

(b) Permit monitoring of off reservation Indian fishing by Fisheries and Game to the extent reasonable and necessary for conservation.

(c) Provide fish catch reports, as to both on and off reservation treaty right fishing, when requested by Fisheries or Game for the purpose of establishing escapement goals and other reasonable and necessary conservation purposes.

All parties in this case agree that on reservation fishing is not subject to state regulation and no issue to the contrary is presented in this case. Indeed, any contention to the contrary would be diametrically opposed to the Indian self-government intent and philosophy of Congress. However, state regulation of off reservation fishing to the extent reasonable and necessary for conservation requires that Fisheries and Game must have all information essential to such limited regulation. From the evidence in this case, the court hereby finds and holds that recording the number of fish taken in treaty right fishing, both on and off reservation, is essential to reliable estimates of future run sizes which are necessary for reasonably accurate calculation of spawning escapement requirements and for the allocation of harvestable fish as provided in this decision.

The lack of adequate, or any, approved identification of treaty right fishermen long has and now does seriously interfere with their fishing and hampers enforcement of both tribal and state regulations reasonable and necessary for conservation. Therefore, each of plaintiff tribes, self-regulated or not, is hereby directed to provide as promptly as practicable both (a) certification and identification of its tribal fishermen as specified in ¶ (f) of the above stated Qualifications; and also (b) fish catch returns as specified in ¶ (c) of the above stated conditions.

The uncontradicted evidence shows that for a considerable time

the Quinault and Yakima tribes have adopted and effectively enforced tribal fishing regulations which in some material respects are more restrictive than the regulations of Fisheries and Game. To a considerable extent those tribes have consulted and cooperated with Fisheries and Game in matters pertaining to responsible regulation of Indian fishing. In the Findings of Fact and Conclusions of Law on file herein the court has found, held and hereby confirms that the evidence in this case clearly establishes that both the Quinault and Yakima Tribes for a considerable time have had, and now have, each of the above stated Qualifications, other than (f), and have provided or permitted each of the above stated Conditions, other than (c). The items excepted can and the court believes will be promptly supplied by both tribes; and when accomplished, the Quinault and Yakima Tribes shall be entitled to exercise their treaty fishing rights without any state regulation thereof, except as hereinabove provided.

The evidence indicates several other plaintiff tribes have capacity for, and are not far from, achievement of the same status, which potentially is within the capability of every plaintiff tribe.

3. Although state police power permits state regulation of the exercise of off reservation treaty fishing rights, under all of the United States Supreme Court decisions cited or quoted hereinabove there can be no doubt that it is *not* within the province of state police power, however liberally defined, to deny or "qualify" rights which are made the supreme law of the land by the federal constitution. Therefore, in each specific particular in which the state undertakes to regulate the exercise of treaty right fishing, all state officers responsible therefor must understand that the power to do so must be interpreted narrowly and sparingly applied, with constant recognition that *any* regulation will restrict the exercise of a right guaranteed by the United States Constitution. Every regulation of treaty right fishing must be strictly limited to specific measures which before becoming effective have been established by the state, either to the satisfaction of all affected tribes or upon hearing by or under direction of this court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish.

To clearly identify state treaty right fishing regulations and to make them more readily understood and usable by plaintiff

tribes and others interested therein such regulations shall be published either separate and apart from other state fishing regulations or as a separate and plainly labeled part thereof readily distinguishable from other fishing regulations.

4. However broadly the word may be used and applied in the theory and practice of fisheries science and management, "conservation" as used in Supreme Court decisions and herein is limited to those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish. In this context, as well as by dictionary definition, "reasonable" means that a specifically identified conservation measure is appropriate to its purpose; and "necessary" means that such purpose in addition to being reasonable must be essential to conservation.

5. The state having the burden of proof as above indicated, no regulation applied to off reservation treaty fishing can be valid or enforceable unless and until it has been shown reasonable and necessary to conservation as above defined. The arrest of, or seizure of property owned or in permitted custody of, a treaty right fisherman under a regulation not previously established to be reasonable and necessary for conservation, is unlawful and may be actionable as to any official or private person authorizing or committing such unlawful arrest or seizure.

6. If alternative means and methods of reasonable and necessary conservation regulation are available the state cannot lawfully restrict the exercise of off reservation treaty right fishing, even if the only alternatives are restriction of fishing by non-treaty fishermen, either commercially or otherwise, to the full extent necessary for conservation of fish.

7. In *Arizona* the United States Supreme Court held that irrigation water rights reserved by implication in an Indian treaty could only be limited in amount to the total reasonably required by the needs of the treaty tribe as determined from time to time indefinitely in the future. That holding cannot be distinguished in principle or application from the fishing rights specifically reserved by the plaintiff tribes and recognized by the United States in the treaties. Since tribal on reservation treaty right fishing is exclusive, fish taken on reservation shall not be included in any allocation of fish between treaty and non-treaty fishermen. Therefore,

the *amount* or *quantity* of any species of fish that may be taken off reservation by treaty right fishing during a particular fishing period can only be limited by either:

(a) The number of fish required for spawning escapement and any other requirements established to be reasonable and necessary for conservation, and

(b) The number of harvestable fish non-treaty fishermen may take at the tribes' "usual and accustomed grounds and stations" while fishing "in common with" treaty right fishermen.

As used above, "harvestable" means the number of fish remaining to be taken by any and all fishermen, at usual and accustomed grounds and stations, after deducting the number of fish required for spawning escapement and tribal needs.

Arizona was concerned with the amount of water impliedly reserved for the use of the treaty tribe and it was held they were entitled to the full amount required to serve their needs. In the present case a basic question is the amount of fish the plaintiff tribes may take in off reservation fishing under the express reservation of fishing rights recorded in their treaties. The evidence shows beyond doubt that at treaty time the opportunity to take fish for personal subsistence and religious ceremonies (FF ## 3, 6) was the single matter of utmost concern to all treaty tribes and their members. The extent of taking fish by tribal members for these purposes is now less than in former times but for a substantial number of tribal members at or near poverty level their need in these particulars is little, if any, less than it was for their ancestors. For these reasons the court finds that the taking of fish for ceremonial and subsistence purposes has a special treaty significance distinct from and superior to the taking of fish for commercial purposes and therefore fish taken to serve ceremonial and subsistence needs shall not be counted in the share of fish that treaty right fishermen have the opportunity to take. Such needs shall be limited to the number of fish actually used for: (a) Traditional tribal ceremonies; and (b) Personal subsistence consumption by tribal members and their immediate families.

By dictionary definition and as intended and used in the Indian treaties and in this decision "in common with" means *sharing*

equally the opportunity to take fish[29] at "usual and accustomed grounds and stations"; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish, as stated above.

While emphasizing the basic principle of sharing equally in the opportunity to take fish at usual and accustomed grounds and stations, the court recognizes that innumerable difficulties will arise in the application of this principle to the fisheries resource. For the present time, at least, precise mathematical equality must give way to more practical means of determining and allocating the harvestable resource, with the methodology of allocation to be developed and modified in light of current data and future experience. However, it is necessary at the outset to establish the scope of the anadromous fish resource which is subject to being "shared equally." The amount of fish of a particular species, from which the harvestable portions allocable to treaty right fishermen and non-treaty right fishermen are to be determined, is not merely the number of harvestable fish of that species which pass through the usual and accustomed fishing places of the various treaty tribes.

It is uncontroverted in the evidence that substantial numbers of fish, many of which might otherwise reach the usual and accustomed fishing places of the treaty tribes, are caught in marine areas closely adjacent to and within the state of Washington, primarily by non-treaty right fishermen. [Ex. F-6, 7; PL-67(b)-(c); JX-2(a), pp. 125-135; Figs. 49-54, Tables 34-60]. These catches reduce to a significant but not specifically determinable extent the number of fish available for harvest by treaty right fishermen. A considerable amount of this harvest is beyond any jurisdiction or control of the State. Some of this harvest is subject to limited state control because the landings are made in areas of state jurisdiction. A considerable number of fish taken within the territorial waters of Washington are under the regulatory authority of the International Pacific Salmon Fisheries Commission, an international body estab-

[29]The court has found and hereby affirms that Indians fished for commercial purposes at and prior to treaty times and have the right to do so now and in the future. If and when any question is raised by any party pertaining to commercial fishing by Indians, it will be heard and determined by the court. (FF #7).

lished by treaty between the United States and Canada. While the defendants cannot determine or control the activities of that Commission, the Washington Department of Fisheries does have some input into development of the harvest program which is prescribed or permitted by that Commission, particularly as it pertains to harvest within Washington waters. The Commission is essentially concerned with assuring adequate spawning escapement from runs subject to its jurisdiction and equal division of the harvestable portion between the two countries. Its control over times, places and manner of harvest is designed to accomplish those results. [Ex. JX-2a, § 2.14, pp. 013-104; and the Commission's annual report for 1971.] Consequently, while it must be recognized that these large harvests by non-treaty fishermen cannot be regulated with any certainty or precision by the state defendants, it is incumbent upon such defendants to take all appropriate steps within their actual abilities to assure as nearly as possible an equal sharing of the opportunity for treaty and non-treaty fishermen to harvest every species of fish to which the treaty tribes had access at their usual and accustomed fishing places at treaty times. Some additional adjustments in the harvesting scheme under state jurisdiction may be necessary to approach more nearly an equal allocation of the opportunity to harvest fish at usual and accustomed grounds and stations.

Therefore, this court finds and holds that the amount of fish of each species from which the harvestable portions shall be determined for the purposes of allocation consistent with this opinion shall be:

1. The total number of fish within the regulatory jurisdiction of the State of Washington which, absent harvest en route, would be available for harvest at the treaty tribes' usual and accustomed fishing places; plus

2. An additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas closely adjacent to but beyond the territorial waters of the State, or outside the jurisdiction of the State, although within Washington waters.

It is suggested in *Puyallup-II* that a distinction between native and propagated steelhead should be made in computing

the allocation of fish to off reservation treaty right and to non-treaty right fishing. This appears to present many difficulties and problems which must be considered and determined with all deliberate speed, by agreement or by judicial decision. Discharge of that responsibility appears to be within the jurisdiction of this court by issues all parties have submitted to this court in the Final Pretrial Order in this case. However, under the *Puyallup-II* mandate to the State Supreme Court it appears appropriate to this court that the state courts hear and determine the matter referred to, at least in the first instance.

8. Certain issues in this case are specified in the Final Pretrial Order which involve reef net fisheries. The only parties in this case directly concerned with these issues are the defendant Reef Net Owners and the plaintiff Lummi Tribe, although it may be other parties and non-parties have the same or similar interests. In the Findings of Fact and Conclusions of Law filed herein, the court has found and held: (a) that there is evidence which the court finds reasonable, credible and sufficient to establish that plaintiff Lummi Tribe has treaty fishing rights in the reef net fishing areas involved; (b) that members of the Lummi Tribe are entitled to and shall have, as a matter of *right*, the opportunity to fish with reef nets in such areas; (c) that while non-treaty fishermen when licensed by the State to fish in reef net areas have the *privilege* of fishing in those areas "in common with" Lummi Tribal members, they do not have the *right* to do so.

The specific number and location of stations in the reef net areas at which Lummi Tribal members shall have the right and opportunity to fish and what, if any, conditions shall be applicable thereto, will be determined by or under direction of this court upon hearing of those matters at the earliest date reasonably convenient to counsel and the court.

9. *Sohappy* is a 1969 decision by Judge Robert Belloni of the Oregon United States District Court on Indian treaty fishing rights involving a number of law and fact issues identical or closely similar to those presented in this case. Much of what was found and held in that thoroughly researched, well reasoned and highly practicable decision is directly applicable to issues to be determined in the present case. The *Sohappy* decision was not appealed and therefore it is controlling as to all parties to that case which include the United States and the Yakima Tribe. The following quotations from

that decision, changed by this court only as bracketed, are hereby adopted and held by this court to be applicable to the issues in the present case.

302 F.Supp. at page 907:

". . . [B]efore [Washington] may regulate the taking and disposition of fish by treaty Indians at their usual and accustomed fishing places:

'(a) It must establish preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes; the burden of establishing such facts is on the state.

'(b) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. As one method of accomplishing conservation objectives it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

'(c) It must so regulate the taking of fish that the treaty tribes and their members will be accorded an opportunity to take, at their usual and accustomed fishing places, by reasonable means feasible to them, . . . fish [to the extent hereinabove specified.]

* * * * * *

At pages 908-909:

". . . state restriction on treaty referenced fishing must be 'necessary for the conservation of the fish.' . . . It [the Supreme Court] was not endorsing any particular state management program which is based not only upon that factor but also upon allocation of fish among particular user groups or harvest areas, or classification of fish to particular uses or modes of taking.

The state may regulate fishing by non-Indians to achieve a wide variety of management or 'conservation' objectives. Its selection of regulations to achieve these objectives is limited only by its own organic law and the standards of reasonableness required by the Fourteenth Amendment. But when it is regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource. The measure of the legal propriety of a regulation concerning the time and manner of exercising this 'federal right' is, therefore, 'distinct from the federal constitutional standard concerning the scope of the police power of the State.' [citations] To prove necessity, the state must show there is a need to limit the taking of fish and that the particular regulation sought to be imposed upon the exercise of the treaty right is necessary to the accomplishment of the needed limitation. This applies to regulations restricting the type of gear which Indians may use as much as it does to restrictions on the time at which Indians may fish."

* * * * * *

At page 911:

"The Supreme Court has said that the right to fish at all usual and accustomed places may not be qualified by the state. Puyallup Tribe et al. v. Department of Game, et al., supra. [citations] I interpret this to mean that the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located."

At page 911:

"There is no reason to believe that a ruling which grants the Indians their full treaty rights will affect the necessary escapement of fish in the least. The only effect will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago."

* * * * * *

At pages 911-912:

"In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy [at least] co-equal with the conservation of fish runs for other users. The restrictions on the exercise of the treaty right must be expressed with such particularity that the Indian can know in advance of his actions precisely the extent of the restriction which the state has [shown] to be necessary for conservation. [citations]

This court cannot prescribe in advance all of the details of appropriate and permissible regulation of the Indian fishery, nor do the plaintiffs ask it to. As the Government itself acknowledges, 'proper anadromous fishery management in a changing environment is not susceptible of rigid predetermina-

tion. * * * the variables that must be weighed in each given instance make judicial review of state action, through retention of continuing jurisdiction, more appropriate than overly-detailed judicial predetermination.' The requirements of fishery regulation are such that many of the specific restrictions, particularly as to timing and length of seasons, cannot be made until the fish are actually passing through the fishing areas or shortly before such time. Continuing the jurisdiction of this court in the present cases may, as a practical matter, be the only way of assuring the parties an opportunity for timely and effective judicial review of such restrictions should such review become necessary.

I also do not believe that this court should at this time and on this record attempt to prescribe the specific procedures which the state must follow in adopting regulations applicable to the Indian fishery. The state must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the tribal entities are interested parties to any regulation affecting the treaty fishing right. They, as well as their members to whom the regulations will be directly applicable, are entitled to be heard on the subject and, consistent with the need for dealing with emergency or changing situations on short notice, to be given appropriate notice and opportunity to participate meaningfully in the rule-making process. [and to seek prompt judicial review of regulations assertedly invalid.]

This does not mean that tribal consent is required for restrictions on the exercise of the treaty rights."

* * * * * *

At page 912:

". . . the state's authority to prescribe restrictions within the limitations imposed by the treaties and directly binding upon the Indians is not dependent upon assent of the tribes or of the Secretary of the Interior. But certainly agreements with the tribes or deference to tribal preference or regulation on specific aspects pertaining to the exercise of treaty fishing rights are means which the state [should] adopt in the exercise of its jurisdiction over such fishing rights. Both the state and the tribes should be encouraged [and directed] to pursue such a cooperative approach . . ."

Thus far, this decision has been confined to discussion and ruling upon major issues, mostly because of the great number of secondary, or comparatively less important, issues of fact and law presented in this case. However, fact findings and legal conclusions, with comment thereon in most instances, on all of the secondary findings are

included in the Findings of Fact and Conclusions of Law filed herein. For the most part the secondary findings and conclusions provide amplifying and implementing details for both major and secondary rulings of the court. Every issue, proposed finding of fact and conclusion of law, of whatever importance, has been individually considered and determined in the Findings of Fact and Conclusions of Law on file in this case, excepting only with a few reservations that are stated and explained in each instance.

Subject to suggested limitations by some of the parties, all parties have urged that the court reserve continuing jurisdiction of this case and have suggested various ways in which such jurisdiction might be exercised. Quotations from *Sohappy,* above quoted and adopted by this court, indicate some of the purposes for, and practical importance of, continuing jurisdiction in this type of case. From the beginining most, if not all, counsel in this case and the court have anticipated that continuing jurisdiction would be of great value to all parties in promptly putting the court's rulings into effect and in providing readily available early hearing and determination of factual and legal questions that may arise in interpreting and applying such rulings. Accordingly, the court does hereby reserve continuing jurisdiction of this case without limitation at this time.

Most if not all parties have also suggested that the court should appoint a master with technical fisheries expertise to assist the court in helping the parties to reach agreed solutions of problems and questions when agreement thereon cannot be reached. Questions regarding whether or not a master should be appointed, the suggested and perhaps other purposes for appointment of a master, with or without technical fisheries expertise; and, if appointed what the master's duties should be and the manner of his selection, will be considered and determined at a hearing on the earliest date after the entry of the judgment and decree reasonably convenient to all counsel. At that hearing counsel are requested to present their views as to whether or not the court should appoint an Advisory Committee on Treaty Right Fishing. The members of such a committee should be knowledgeable and responsible citizens inclined to and capable of objectively considering, determining and reporting to the court the viewpoint of the interested public concerning Indian fishing as to: satisfactory solution of problems; means of expediting better communication between Indian and non-Indian officials and fishermen

and keeping interested citizens in this area more accurately informed on matters pertaining to Indian fishing. Other topics to be considered at the conference may be suggested by counsel.

The remaining issues in this case reserved for separate pretrial and trial in the future, however such issues may be determined, do not have direct or indirect bearing upon any issue submitted and heretofore tried by this court. Accordingly, this decision and the Declaratory Judgment and Decree based thereon, upon entry in this case, shall become unreservedly final and reviewable as provided by 28 U.S.C.A. 2201; subject only to determination of any motions that may be appropriately and timely served and filed following entry of the Final Judgment and Decree. Each such motion, if any, that may be filed shall be supported[30] by a memorandum of authorities to which counsel for adverse parties shall timely serve and file a responsive memorandum of authorities, following which such motions, if any, shall be promptly heard and determined by the court on the earliest date reasonably convenient to counsel and the court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on regularly for trial on August 27, 1973, upon the basis of a final pretrial order entered August 24, 1973, and the presentation of evidence concluded September 18, 1973. Counsel for all parties appeared and presented nearly 50 witnesses, whose testimony was reported in 4,600 pages of trial transcript, more than 350 exhibits, pretrial briefs, final oral argument 12/9—10/73 and post trial briefs. In addition to consideration of the above evidence and material by the court, more than 500 proposed findings of fact and conclusions of law, submitted by counsel and annotated to the record, have been checked to determine the accuracy

[30]Local Rules WD Wash. Civil Rule 7.

of every citation made by any counsel alleged to support a proposed finding or conclusion. Many of the proposed findings and conclusions were modified and many of the supporting citations were corrected, and additional findings and conclusions not proposed by any party were developed. The court has also read and examined, individually and in relation to one another, every case cited by any party as possible authority concerning any issue in this case, as well as other cases not cited by the parties.

Based upon this exhaustive examination of the controlling law, the briefs and oral argument of counsel and upon a preponderance of the evidence found credible and inferences reasonably drawn therefrom, the court now makes the following Findings of Fact and Conclusions of Law:

TREATY STATUS

1. The United States has entered into treaties with each of the following Indian tribes or bands (herein collectively referred to as "Plaintiff tribes" and individually by the shorter name set out after each such tribe), or with their predecessors in interest:

Hoh Indian Tribe ("Hoh Tribe")	Treaty with the Quinaeilt, et al. (Treaty of Olympia), July 1, 1855, and January 25, 1856, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 971.
Lummi Tribe of Indians ("Lummi Tribe")	Treaty of Point Elliott, January 22, 1855, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 927.
Makah Indian Tribe	Treaty with the Makah (Treaty of Neah Bay), January 31, 1855, ratified March 8, 1859, and proclaimed April 18, 1859, 12 Stat. 939.

Muckleshoot Indian Tribe ("Muckleshoot Tribe")	Treaty of Point Elliott, *supra*, and also Treaty of Medicine Creek, December 26, 1854, ratified March 3, 1855, and proclaimed April 10, 1855, 10 Stat. 1132.
Nisqually Indian Community of the Nisqually Reservation ("Nisqually Tribe")	Treaty of Medicine Creek, *supra*.
Puyallup Tribe of the Puyallup Reservation ("Puyallup Tribe")	Treaty of Medicine Creek, *supra*.
Quileute Tribe of the Quileute Reservation ("Quileute Tribe")	Treaty with the Quinaeilt, et al., *supra*.
Quinault Tribe of Indians ("Quinault Tribe")	Treaty with the Quinaeilt, et al., *supra*.
Sauk-Suiattle Indian Tribe ("Sauk-Suiattle Tribe")	Treaty of Point Elliott, *supra*.
Skokomish Indian Tribe ("Skokomish Tribe")	Treaty of Point No Point January 26, 1855, ratified March 8, 1859, and proclaimed April 29, 1859, 12 Stat. 933.
Squaxin Island Tribe of Indians ("Squaxin Island Tribe")	Treaty of Medicine Creek *supra*.
Stillaguamish Indian Tribe ("Stillaguamish Tribe")	Treaty of Point Elliott, *supra*.
Upper Skagit River Tribe ("Upper Skagit Tribe")	Treaty of Point Elliott, *supra*.
Confederated Tribes and Bands of the Yakima Indian Nation ("Yakima Nation")	Treaty with the Yakimas, June 9, 1855, ratified March 8, 1859, and proclaimed April 18, 1859, 12 Stat. 951.

Each of said treaties contains a provision securing to the Indians certain off-reservation fishing rights. The following provision form the Treaty of Medicine Creek is typical of these treaty provisions:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * *."

[FPTO §§ 1, 3-1; see also references as to each Plaintiff tribe under paragraphs as to such tribes, *infra*.]

PRETREATY ROLE OF FISHING AMONG NORTHWEST INDIANS

2. The anthropological reports and testimony of both Dr. Barbara Lane and Dr. Carroll Riley have been thoroughly studied and considered by the court. In so doing, the court has noted the nature, extend and duration of field work in the case area and academic research. During trial constant observation was made of the attitude and demeanor of both experts while on the stand as witnesses, and the substance of their testimony has been carefully evaluated. Allowance for the criticism by defendants that some of Dr. Lane's conclusions are "over formulated" has been made in evaluating her testimony in every instance where the criticism might be applicable. Based upon these and other factors, the court finds that in specific facts, the reports of Dr. Barbara Lane, Exhibits USA-20 to 30 and USA-53, have been exceptionally well researched and reported and are established by a preponderance of the evidence. They are found to be authoritative and reliable summaries of relevant aspects of Indian life in the case area at and prior to the time of the treaties, including the treaty councils, Indian groups covered by the treaties, the purposes of the treaties and the Indians' understanding of treaty provisions. In these particulars, nothing in Dr. Lane's report and testimony was controverted by any credible evidence in the case. Dr. Lane's opinions, inferences and conclusions based upon the information stated in detail and well documented in her reports, appeared to the court to be well taken, sound and reasonable. In summary, the court finds that where their testimony differs in any significant particular, the testimony of Dr. Lane is more credible and satisfactory than that of Dr. Riley and is accepted as such except as otherwise specified.

3. In pretreaty times Indian settlements were widely dispersed throughout Western Washington. There was considerable local diversity in the availability and importance of specific animal, plant and mineral resources used for food and artifacts. [FPTO § 3–32] But one common cultural characteristic among all of these Indians was the almost universal and generally paramount dependence upon the products of an aquatic economy, especially anadromous fish, to sustain the Indian way of life. [Ex. G–17*o*, pp. 286–287; Exs. USA–20 to 30 and 53; Exs. G–21 to 26] These fish were vital to the Indian diet, played an important role in their religious life, and constituted a major element of their trade and economy. Throughout most of the area salmon was a staple food and steelhead were also taken, both providing essential proteins, fats, vitamins, and minerals in the native diet. [FPTO §§ 3–32, 3–33; Ex. USA–20; Ex. PL–40, p. 577; Ex. G–4, pp. 193-197] There was considerable fluctuation in abundance and availability of fish from year to year. Some causes of fluctuation were regular and predictable, as in the case of runs of certain species and races of salmon. Other causes were erratic, such as flooding and alteration in watercourses. [FPTO § 3–32]

4. The major food sources of the Northwest Indians were the wild fish, animal and vegetative resources of the area. It was, therefore, necessary for the people to be on hand when the resources were ready for harvest. These seasonal movements were reflected in native social organization. In the winter, when weather conditions generally made travel and fishing difficult, people remained in their winter villages and lived more or less on stored food. Fresh fish and other foods were harvested during the winter but that season was devoted primarily to ceremonies and manufacturing tasks. During this time people congregated into the largest assemblages and occupied long, multifamily houses. Throughout the rest of the year individual families dispersed in various directions to join families from other winter villages in fishing, clam digging, hunting, gathering roots and berries, and

agricultural pursuits. People moved about to resource areas where they had use patterns based on kinship or marriage. Families did not necessarily follow the same particular pattern of seasonal movements every year. [FPTO § 3–32; Ex. USA–20; see also Exs. USA–21 to 30 and 53; Exs. G–17a–*o*; Exs. G–21 to 26; Exs. PL–23 and PL–24; Ex. G–4, pp. 193–197]

5. At the time of the treaties and prior thereto, utilization of the rich fishery resource required an intimate knowledge of local environments and the locally available species as well as the development of a variety of specialized techniques for taking fish. [FPTO § 3–32; Ex. USA–20; Ex. JX–2a, § 3.1, pp. 108–114, Figs. 44–47, 280–283; Ex. USA 31e, pp. 17–26; Ex. PL–88a–d; Ex. L–7] The latter involved both group and individual activity and equipment. [FPTO § 3–76] Adequate Indian food preservation techniques had been developed by the time of the treaties and fish were able to be stored for use throughout the year and transported over great distances. [FPTO § 3–32; Ex. USA–20, p. 1; Ex. MLQ–1, p. 1] However, the Indians' harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. The amounts of fish that could be harvested were particularly affected by run-size fluctuations caused by natural conditions and water conditions occurring at the time the fish were running, e.g., flooding, which limited the effectiveness of the Indian fishing gear. [Tr. 2006, *l.* 17 to 2012, *l.* 24; Ex. PL–40, p. 577; Ex. F–39; FPTO § 3-32; Ex. USA–20, p. 5]

6. The first-salmon ceremony, which with local differences in detail was general through most of the area, was essentially a religious rite to ensure the continued return of salmon. The symbolic acts, attitudes of respect and reverence, and concern for the salmon reflected a ritualistic conception of the interdependence and relatedness of all living things which was a dominant feature of native Indian world view. Religious attitudes and rites insured that salmon were never wantonly wasted and that water pollution was not permitted during the salmon season. [FPTO § 3–33; Ex. USA–20, p. 9]

7. At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographic area. Fish was a basic element of the trade. There is some evidence that the volume of this intra-tribal trade was substantial, but it is not possible to compare it with the volume of present day commercial trading in salmon. Such trading was, however, important to the Indians at the time of the treaties. [Ex. USA–20, pp. 2–10; Tr. 1778, *l.* 6 to 1784, *l.* 13] In addition to potlatching, which is a system of exchange between communities in a social context often typified by competitive gifting, there was a considerable amount of outright sale and trade beyond the local community and sometimes over great distances. [Ex. USA–20, pp. 2–10] In the decade immediately preceding the treaties, Indian fishing increased in order to accommodate increased demand for local non-Indian consumption and for export, as well as to provide money for purchase of introduced commodities and to obtain substitute non-Indian goods for native products which were no longer available because of the non-Indian movement into the area. [Ex. USA–20, p. 13] Those involved in negotiating the treaties recognized the contribution that Indian fishermen made to the territorial economy because Indians caught most of the non-Indians' fish for them, plus clams and oysters. [Ex. Pl–11; Ex. USA–20, p. 15]

8. At the time of the treaties, non-Indian commercial fishing enterprises were rudimentary and largely unsuccessful. In the 1840's and 50's, salmon was packed and shipped from the Columbia River and the case area to such distant places as New York, San Francisco, the Hawaiian Islands, South America and China, but inadequate preservation techniques and slow transportation facilities caused the salmon to reach the markets in unsatisfactory condition, and it obtained a bad reputation among dealers. [Ex. Pl–50, p. 310; Ex. MLQ–1, p. 1] There was no statistically measurable commercial fishery at the time the treaties were negotiated. [Ex. MLQ–1, p. 15] At the time of the treaties the commercial fisheries in the

case area posed no threat to the abundance of the fish resources. [Tr. 2006, *l.* 12–16; Tr. 2382, *l.* 10–18; Exs. PL–7 and PL–8]The non-Indian commercial fishing industry did not fully develop in the case area until after the invention and perfection of the canning process. The first salmon canner in Puget Sound began in 1877 with a small operation at Mukilteo. Large-scale development of the commercial fisheries did not commence in Puget Sound until the mid-1890's. [Ex. MLQ–1, pp. 1–3] The large-scale development of the commercial fishing industry in the last decades of the Nineteenth Centry brought about the need for regulation of fish harvests. [Ex. JX–2a, § 2.3.1, pp. 60–62]

9. There was a sharp decline in Indian population in the case area in the period after extensive contact with Europeans and Americans which occurred around 1780. It has been estimated that Indian populations in the Puget Sound region declined by approximately 50% between 1780 and 1840, but pre-treaty censuses were often incomplete and inaccurate. The Gibbs-Stevens census of 1854 shows a total of 7,559 Indians for all of Western Washington. A decline in population continued during the decades following the signing of the treaties, due in large part to diseases introduced by non-Indians. [Ex. D–1, pp. 9–12; Ex. G–4, pp. 181–184; Ex. MLQ–1, pp. 14, 16] The non-Indian population at treaty times has been estimated at approximately 2,000 people in Western Washington. [Tr. 2475, *l.* 7 to 2476, *l.* 8] Because of the great abundance of fish resources and these limited populations, there was no need to regulate the taking of fish by either Indians or non-Indians at treaty times. [Tr. 1849, *l.* 18–22; Tr. 2381, *l.* 25 to 2382, *l.* 18]

10. The Northwest Indians developed and utilized a wide variety of fishing methods which enabled them to take fish from nearly every type of location at which fish were present. They harvested fish from the high seas, inland salt waters, rivers and lakes. They took fish at river mouths as well as at accessible points or stretches along the rivers all the way to the headwaters. Some locations

were more heavily utilized than others. Like all fishermen, they shifted to those locales which seemed most productive at any given time. [Exs. USA–20 to 30 and 53] Fishing methods varied according to the locale but generally included trapping, dip netting, gill netting, reef netting, trolling, long-lining, jigging, set-lining, impounding, gaffing, spearing, harpooning and raking. [FPTO § 3–33] Control and use patterns of fishing gear varied according to the nature of the gear. Certain types required cooperative effort in their construction and/or handling. Weirs were classed as cooperative property but the component fishing stations on the weir were individually controlled. [FPTO § 3–76; Ex. USA–26, pp. 13–14]

11. Aboriginal Indian fishing was not limited to any species. They took whatever species were available at the particular season and location. Many varieties, including salmon and steelhead, halibut, cod, flounder, ling cod, rockfish, herring, smelt, eulachon, dogfish and trout, were taken and were important to varying degrees as food and as items of trade. [FPTO § 3–33; Ex. G–4, pp. 194–195]

12. Indian fishing practices at treaty times were largely unrestricted in geographic scope. Generally, individual indians had primary use rights in the territory where they resided and permissive use rights in the natal territory (if this was different) or in territories where they had consanguineal kin. Subject to such individual claims, most groups claimed autumn fishing use rights in the waters near to their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups from other villages. [FPTO § 3-34]

13. Each of the Plaintiff tribes had usual and accustomed fishing places within the case area. Although there are extensive records and oral history from which many specific fishing locations can be pinpointed, it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations. [FPTO § 3-34; Ex. USA–20, p. 21; Ex. USA–52, p. 4, *l.* 7 to p. 5, *l.* 29] Among the reasons for this are the following: 1) Indian

fisheries existed at all feasible places along a given drainage system. Fishing stations which were the site of weirs or permanent villages are more easily documented than riffles where fish were speared; 2) Indian fishermen shifted to those locales which seemed most productive at any given time depending upon such factors as changes in river flow, turbidity or water course; 3) some important recorded fishing sites are no longer extant because of subsequent man-made alterations in watersheds and water system; and, 4) use of some sites has been discontinued because appropriate Indian gear for those sites has been outlawed or because competing uses and users have made utilization of the sites by Indian fishermen unfeasible. [Ex. USA–20, pp. 21–23; Ex. USA–27b, pp. 1–3] Documentation as to which Indians used specific fishing sites is incomplete. George Gibbs noted that:

> "As regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season." [Ex. USA–20, p. 18; Ex. USA–27b, p. 3; Ex. G–4, p. 186]

14. Although not all tribes fished to a considerable extent in marine areas, the Lummi reef net sites in Northern Puget Sound, the Makah halibut banks, Hood Canal and Commencement Bay and other bays and estuaries are examples of some Indian usual and accustomed fishing grounds and stations in marine waters. Marine waters were also used as thoroughfares for travel by Indians who trolled en route. [Ex. PL–75; Tr. 2847, *l.* 13 to 2850, *l.* 23] Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the trolling Indians. [Tr. 2177, *l.* 24 to 2180, *l.* 4]

15. The United States claimed the area now embraced within the State of Washington by discovery and settlement and by the treaty extinguishment of conflicting claims of Spain (Treaty of February 22, 1819, 8 Stat. 252), Russia (Convention of April 17, 1824, 8 Stat. 302), and Great Britain (Treaty of June 15, 1846, 9 Stat. 869). By the Act of August 14, 1848, 9 Stat. 323, the United States established the Oregon Territory and provided that nothing contained in said act "shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians * * *." Section 14 of that act extended to the Oregon Territory the Northwest Ordinance of 1787, 1 Stat. 51, Note a, which provides that "good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent." By an Act of June 5, 1850, 9 Stat. 437, Congress authorized the negotiation of treaties with the Indian tribes in the Oregon Territory (which then included the area which now comprises the State of Washington) for extinguishing their claims to land lying west of the Cascade Mountains. By the Act of March 2, 1853, 10 Stat. 172, Congress organized the Washington Territory out of part of the Oregon Territory (including all of the present State of Washington) and provided that nothing in said act shall affect the authority of the United States to "make any regulations respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise," which the Government could make if that act had never been passed. All federal laws relating to the Oregon Territory not inconsistent with the 1853 Act were expressly continued in force in Washington Territory. Section 2 of the Act provided for appointment of a governor who was also to perform the duties of Superintendent of Indian Affairs in the Territory. The Appropriation Act of March 3, 1853, 10 Stat. 226, 238,

authorized the President to negotiate with Indian tribes west of Missouri and Iowa 'for the purpose of securing the assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indian tribes in whole or in part to said lands; * * *." The Appropriation Act of July 31, 1854, 10 Stat. 315, 330, authorized the use of appropriations for making treaties in several territories, including Washington, prior to July 1, 1855. [FPTO § 3–28]

16. The Act of February 22, 1889, 25 Stat. 676, admitting Washington to statehood, provided as a precondition to such statehood, that the people of the state forever disclaim all right and title to all lands owned or held by any Indian or Indian tribes and until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and shall remain under the absolute jurisdiction and control of Congress. Washington accepted this requirement and incorporated it into Article XXVI of the State Constitution. Washington was admitted into the Union as a state on November 11, 1889. 26 Stat. Proclamations no. 8. [FPTO § 3–29]

17. On December 26, 1853, Isaac Stevens, the first Governor and Superintendent of Indian Affairs of the Washington Territory, wrote to the Commissioner of Indian Affairs suggesting the necessity of making treaties with the Indians west of the Cascade Mountains. He pointed out that these tribes lived on different watercourses, bays and inlets of Puget Sound, and lands should be set aside for their use. On August 30, 1854, the Acting Commissioner of Indian Affairs notified Governor Stevens of his appointment to negotiate treaties with all tribes in the Washington Territory. Governor Stevens was directed that in making the treaties he should endeavor to unite the "numerous bands and fragments of tribes into tribes, * * *" and to furnish the Commissioner of Indian Affairs a skeleton map of Washington Territory, showing the location of the different tribes and bands, and the

boundaries of the regions claimed by each. In carrying out his duties as Superintendent of Indian Affairs, Governor Stevens had previously, on March 22, 1854, appointed Colonel Michael T. Simmons as Indian Agent for the Puget Sound District and had directed him to visit the various tribes in his district, to make a census of the tribes and bands, ascertaining as nearly as possible the boundaries of the territory claimed by each, and at the same time to organize the small bands into tribes and appoint chiefs for each. Governor Stevens was assisted in arranging for the treaties also by George Gibbs, a lawyer, surveyor and ethnologist, who was one of the sources of information relative to the identity and location of Western Washington tribes and who wrote an extensive ethnological report in 1854-55, and by Colonel B. F. Shaw, an interpreter. [FPTO § 3–30]

18. No formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government. Governor Stevens, acting upon instructions from his superiors and recommendations of his subordinates, deliberately created political entities for purposes of delegating responsibilities and negotiating treaties. In creating these entities Governor Stevens named many chiefs and sub-chiefs. [Ex. USA–27a, pp. 14–29; Ex. USA–20, p. 28]

NEGOTIATION AND EXECUTION OF THE TREATIES

19. The principal purposes of the treaties were to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of Indians and non-Indians in the area. The United States was concerned with forestalling friction between Indians and settlers and between settlers and the government. The Indians had received constant assurances from settlers and government representatives that they would be compensated for lands which were being

settled by United States' citizens. Settlers had taken up land claims under the Donation Act even though the Indian rights had not yet been extinguished by treaties as required by the act creating the Oregon Territory. [FPTO § 3–35; Ex. USA–20, p. 24] Governor Stevens and the treaty commissioners were not authorized to grant to the Indians or treat away on behalf of the United States any governmental authority of the United States. [Ex. D–1, p. 29, *l.* 11-18; Tr. 1862, *l.* 6–13; Tr. 1864, *l.* 20 to 1865, *l.* 24]

20. At the treaty negotiations, a primary concern of the Indians whose way of life was so heavily dependent upon harvesting anadromous fish, was that they have freedom to move about to gather food, particularly salmon, (which both Indians and non-Indians meant to include steelhead), at their usual and accustomed fishing places. [Exs. PL–15, PL–16b, PL–17c; Ex. USA–20, pp. 25–26; Ex. MLQ–1, p. 14; Tr. 2172, *l.* 3–12; Tr. 2352, *l.* 14 to 2365, *l.* 2; Ex. PL–9, pp. 28–29] The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, but that the white man also would be allowed to fish. [Ex. PL–17c, p. 1e] In 1856, it was felt that the development of the non-Indian fisheries in the case area would not interfere with the subsistence of the Indians. [Exs. PL–7, PL–8]

21. It was the intention of the United States Government, in negotiating treaties with the Indians, to make at least non-coastal tribes agriculturists, although not to restrict them to that, to diversify Indian economy, to teach western skills and trades to the Indians and to accomplish a transition of the Indians into western culture. There was no intent, however, to prevent the Indians from using the fisheries for economic gain. [Ex. D–1, p. 23, *l.* 9–25, p. 23, *l.* 33 to p. 24, *l.* 25; Ex. USA–20, p. 26; Tr. 1916, *l.* 25 to 1917, *l.* 9; Treaty of Medicine Creek, art. 10, 10 Stat. 1132; Treaty of Point Elliott, art 14, 12 Stat. 927; Treaty of Point No Point, art. 11, 12 Stat. 933; Treaty with the Makahs (Treaty of Neah Bay), art. 11, 12 Stat. 939; Treaty of the Yakimas, art. 2, art. 5, 12 Stat. 951; Exs. PL–32 and PL–47, pp. 455–456; Tr. 1827, *l.*

25 to 1828, *l.* 24; Tr. 2418, *l.* 4 to 2421, *l.* 9; Tr. 2453, *l.* 22 to 2454, *l.* 13] Upon their removal to reservations, the Indians began farming, with greater success being experienced by the Puget Sound tribes than by the tribes on the ocean coast. [Ex. PL–42]

22. There is no record of English having been spoken at the treaty councils, but it is probable that there were Indians at each council who would have spoken or understood some English [Ex. D–1, p. 24, *l.* 31 to p. 25, *l.* 6; Tr. 2161, *l.* 2 to 2163, *l.* 4; Tr. 2392, *l.* 2 to 2394, *l.* 3] One Snohomish Indian who understood English helped translate the Point Elliott treaty. [Ex. PL–12; Tr. 2390, *l.* 24 to 2391, *l.* 18] Since, however, the vast majority of Indians at the treaty councils did not speak or understand English, the treaty provisions and the remarks of the treaty commissioners were interpreted by Colonel Shaw to the Indians in the Chinook jargon and then translated into native languages by Indian interpreters. Chinook jargon, a trade medium of limited vocabulary and simple grammar, was inadequate to express precisely the legal effects of the treaties, although the general meaning of treaty language could be explained. Many of those present, however, did not understand Chinook jargon. [FPTO § 3–37; Ex. USA–20, pp. 28–29; Ex. G–29a; Ex. Y–21; Tr 1886, *l.* 11 to 1887, *l.* 11; Tr. 2403, *l.* 24 to 240, *l.* 6] There is no record of the Chinook jargon phrase that was actually used in the treaty negotiations to interpret the provision "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory." [Ex. USA–20, p. 26; Tr. 2372, *l.* 15 to 2374, *l.* 7] A dictionary of the Chinook jargon, prepared by George Gibbs, indicates that the jargon contains no words or expressions that would describe any limiting interpretation on the right of taking fish. [Ex. G-29a; Ex. Y–21; Tr. 2460, *l.* 10 to 2461, *l.* 1]

23. The treaty language "in common with all citizens of the Territory" was probably introduced by George Gibbs, who was a lawyer and advisor to Governor Stevens. [Ex. USA–20, p. 26; Tr. 1943, *l.* 24 to 1944, *l.* 12] There is

no discussion of the phrase in the minutes of the treaty councils, [Exs. PL–10a, PL–10b, PL–12, PL–14, PL–15, PL–16b, PL–17a, PL–17b, PL–17c] in the instructions to Stevens [Exs. PL–1, PL–34] or to the treaty negotiators, or in Stevens' letters of transmittal of the treaties. [Exs. PL–11, PL–14] There appears to be no phrase in the Chinook jargon that would interpret the term in any exact legal sense. [Ex. G–29a; Ex. Y–21]

24. Although there is no evidence of the precise understanding the Indians had of the treaty language, the treaty commissioners probably used the terms "usual and accustomed" and "in common with" in their common parlance, and the meaning of them as found in a contemporaneous dictionary most likely would be what was intended by the Government representatives. [Tr. 1946, *l.* 12–21] The 1828 and 1862 editions of Webster's American Dictionary of the English Language define the terms as follows:

> *accustomed:* Being familiar by use; habituated; inured * * * usual; often practiced.
>
> *common:* Belonging equally to more than one, or to many indefinitely * * * belonging to the public; having no separate owner * * * general; serving for the use of all.
>
> *usual:* Customary; common; frequent; such as occurs in ordinary practice or in the ordinary course of events. [Ex. PL–86]

The Indians who negotiated the treaties probably understood the concept of common ownership interest which could have been conveyed in Chinook jargon. [Tr. 2024, *l.* 2 to 2028, *l.* 3; Tr. 2048, *l.* 14 to 2049, *l.* 3] The clause "usual and accustomed [fishing] grounds and stations" was all-inclusive and intended by all parties to the treaty to include reservation and off-reservation areas. [Tr. 2851, *l.* 5–19] The words "usual and accustomed" were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental. [Tr. 2176, *l.* 1–22; Tr. 2177, *l.* 24 to 2178, *l.* 5] The restrictive sense of the term "usual and accustomed" could have been

conveyed in Chinook jargon. [Tr. 1951, *l.* 7 to 1952, *l.* 10]

25. In an extensive report on the Indian Tribes of the Territory of Washington, dated March 4, 1854, George Gibbs had noted that the right of fishery was a subject "concerning which difficulties may arise" and that the Indians would require liberty of motion for the purpose of seeking fish in their proper season. [Ex. PL–9, p. 29] Elsewhere he observed that the fisheries "are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking." [Ex. G–4, p. 186] This was a generalization, probably subject to certain exceptions. [Ex. USA–20, pp. 18–19]

26. There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty. The most that could be implied from the treaty context is that the Indians may have been told or understood that non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians. [Ex. PL–10a, 8th page.]

27. Prior to the convening of the treaty councils Governor Stevens sent B. F. Shaw, who was later the official interpreter of the councils, to the Indian villages to explain the purposes of the councils and urge their attendance. Shaw told the Indians that the government wanted them to sell their land for a moderate sum of money and to accept such reservations and other privileges as could be agreed upon at the council. [Ex. USA–45, p. 28] While there is no record of any specific privileges discussed during these contacts, the treaty commission's prior awareness of the importance the Indians attached to fishing makes it probable that the continuance of the right to take fish was one that Shaw had in mind or discussed. [Ex. PL–9, p. 29; Ex. PL–10a, 1st and 3rd pages]

28. At the time of the treaties Indian control over fishing practices was by customary modes of conduct

rather than by formal regulations. Controls were necessary in cooperative fishing efforts which required coordination by someone who organized and directed the group effort. The construction of a weir was usually a cooperative effort, a number of men working under the direction of a leader. The entire community usually had access to the weir, the leader regulating the order of use and the times at which the weir was opened to allow upstream escapement for spawning and/or supply for upriver fishermen. Techniques such as spearing or trolling in salt water which involved individual effort were not regulated or controlled anyone else. [Ex. USA–20, pp. 19, 20] Apart from one instance when the Makahs prohibited a non-Indian from fishing on their reservation, there is no evidence at the time of the treaties that either party intended to restrict the others fishing because it was not contemplated that they would interfere with each other. [Tr. 2032, *l.* 14 to 2033, *l.* 6; Ex. PL–8; Ex. USA–20, pp. 20–21]

POST-TREATY INDIAN FISHING

29. Fish continue to provide a vital component of many Indians' diet. For others it may remain an important food in a symbolic sense — analogous to Thanksgiving turkey. Few habits are stronger than dietary habits and their persistence is usually a matter of emotional preference rather than a nutritional need. For some Indians, fishing is also economically important. Fishing is also important for some non-Indians. [FPTO § 3–38]

30. Since treaty times, Indians and non-Indians have adopted new fishing techniques and gear. Indians no longer fish from dugouts, just as non-Indians no longer fish from wooden sailboats. Indians no longer use bark nets and non-Indians no longer use cotton or linen nets. [FPTO § 3–38]

31. Subsequent to the execution of the treaties and in reliance thereon, the members of the Plaintiff tribes have continued to fish for subsistence, sport and commercial purposes at their usual and accustomed places. Such

fishing provided and still provides an important part of their livelihood, subsistence and cultural identity. [Exs. PL–44, p. 466; PL–45, p. 467; PL–46, p. 39; Exs. QN–2 and QN–3; Exs. H–1 and H–2; Ex. L–5; Exs. MS–2, MS–3, MS–6, MS–7, MS–8, MS–9 and MS–10; Exs. Y–13 and Y–26; USA–68; USA–69 and USA–70] The Indian cultural identification with fishing is primarily dietary, related to the subsistence fishery, and secondarily associated with religious ceremonies and commercial fishing. Indian commercial fishermen share the same economic motivation as non-Indian commercial fishermen to maximize their harvest and fishing opportunities. [Ex. F–35, p. 24 *l.* 12–23; Ex. F–40, p. 8, *l.* 2–6, p. 118, *l.* 17 to p. 19, *l.* 12; Ex. F–45, p. 17, *l.* 3 to p. 18, *l.* 2; Tr. 740, *l.* 16 to 742, *l.* 14; Tr 2566, *l.* 24 to 2567, *l.* 4; Tr. 2896, *l.* 22 to 2897, *l.* 7; Tr. 3031, *l.* 24 to 3232, *l.* 3] Indians allow non-Indians to fish on their reseration in sport fisheries for which Indians serve as guides and charge a license fee. [Tr. 2601, *l.* 10–22; Tr. 3475, *l.* 5–13; Tr. 3511, *l.* 23 to 3512, *l.* 15]

32. Some members of the Plaintiff tribes presently fish in the regular commercial fisheries of this State and the Pacific Coast. These Indians fish with the same gear as other fishermen. When fishing in the State commercial seasons, treaty Indians are not required to purchase a license or pay a landing tax. [Tr. 721, *l.* 5–9; Tr. 2489, *l.* 17–19; Tr. 2498, *l.* 12–15; Tr. 3865, *l.* 16–21; Ex. F–45, p. 14, *l.* 23 to p. 15, *l.* 4] With the exception of the full-time Indian commercial fishermen who fish in the all-citizen commercial fisheries of the State, Indian fishermen frequently have other occupations, but fish for food and to supplement their incomes. [Tr. 2600, *l.* 2-7; Tr 2602, *l.* 5–22; Tr. 2886, *l.* 3–16; Ex. F–45, p. 15, *l.* 5–12]

33. Acculturation of Western Washington Indians into western culture began prior to treaty times and has continued to the present day. Today most Indians wear traditional western clothing, speak English, utilize the western economic system and western technology, share western religious traditions and participate in the western socio-political organization. Traditional religious rites and

ceremonies are no longer widely observed by most tribes. Modern Indians share similar goals with modern non-Indians to acquire most items of American material culture. [Tr. 1991, *l.* 13 to 1992, *l.* 25; Tr. 2431, *l.* 9–16; Tr. 2439, *l.* 9 to 2444, *l.* 8; Tr. 2448, *l.* 8 to 2450, *l.* 4; Tr. 2508, *l.* 19 to 2409, *l.* 4; Tr. 2893, *l.* 7 to 2894, *l.* 15; Ex. F–35, p. 24, *l.* 12–23; Ex. D–1, p. 22, *l.* 9–25; Tr. 2507, *l.* 17 to 2508, *l.* 10; Tr. 2608, *l.* 17 to 2609, *l.* 4; Ex. F–30, Answer to Question 40 in each set of Interrogatories to Plaintiff tribes; Ex. F–40, p. 11, *l.* 22 to p. 12, *l.* 13; Ex. F–42, p. 10, *l.* 18–22; Ex. F–45, p. 15, *l.* 13 to p. 16, *l.* 7] Employment acculturation of Indians has been a major cause of the drastic decline from treaty times of the number of Indians engaged in fishing. [Tr. 1992, *l.* 5–10; Tr. 2599, *l.* 2–13; Tr. 3468, *l.* 16 to 3469, *l.* 8; Ex. F–40, p. 12, *l.* 14 to p. 13, *l.* 3] Additionally, many years of state enforcement actions against Indians exercising their claimed treaty right to fish have caused many members of Plaintiff tribes to discontinue such fishing activities at several of their usual and accustomed fishing places. [Exs. USA–20, p. 23; H–1; H–2; L–5; MS–2; MS–3; MS–7; MS–8; MS–9; MS–10]

34. Some of the Plaintiff tribes presently regulate their tribal members' fishing. [Ex. JX–2b] In general, the pattern of the Indian tribal fishing regulations is designed to achieve a certain percentage spawning escapement from their fisheries. [Tr. 1413, *l.* 12 to 414, *l.* 9; Tr. 1415, *l.* 5 to 1416, *l.* 1; Tr. 1418, *l.* 16–19] Tribal regulations generally restrict the harvest of fish in one or more of the following ways: 1) limitation on the number of fishermen; 2) separation between net sites; 3) restriction on the length of drift nets; 4) restriction on net length to certain channel widths; 5) restriction of mesh sizes; 6) weekly closed periods; 7) season dates which reflect when fish are available. [Tr. 1411, *l.* 8 to 1413, *l.* 11]

SPECIFIC TRIBES

Hoh Tribe

35. The Hoh Tribe is the present-day tribal entity which, with respect to the matters that are the subject of

this litigation, is a political successor in interest to some of the Indian tribes or bands which were parties to the Treaty of Olympia. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Hoh Reservation. This tribe is organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. § 476. Its membership is determined in accordance with its Constitution and Bylaws approved by the Assistant Secretary of the Interior on Feburary 28, 1969. Its present membership roll was approved by a representative of the Secretary of the Interior on December 15, 1972. The tribe presently has approximately 62 members. [FPTO § 3–11; Ex. PL–55]

36. One of the earliest documentations of Hoh Indian fisheries is an 1853 account by a Russian survivor of an 1808 shipwreck. He wrote of his party's travels up the Hoh River during which they obtained salmon and fish roe from the Indians at various points along the river. At one location about 13 miles upstream the Indians refused to sell them any fish, explaining that high water had covered their fish traps. At the upper part of the river the Russians lived well on stored winter salmon which they found in the houses of Indians who withdrew from their settlements when the Russians arrived. [Ex. USA–22, pp. 5, 9–11]

37. Prior to the treaties the Hoh Indians had devised fish taking techniques adaptable for a variety of water and weather conditions. They constructed artificial falls by placing hemlock logs across the smaller streams. During periods of high water they would catch salmon below the falls with special falls nets. They observed certain rituals to assure continued fish runs. [FPTO § 3–82; Ex. USA–22, pp. 15–16]

38. Linguistically, culturally and historically the Quileute and Hoh Indians were one people who in 1855 lived along the Quillayute and Hoh river systems. Their identification as two separate tribes is a relatively recent artifact of government administration. [Ex. USA–22, p. 1]

39. In treaty times the usual and accustomed fishing

places of the Quileute and Hoh Indians included the entire Hoh river system and the Quillayute, Dickey, Bogachiel, Calawah, Soleduck, Queets and Quinault river systems. [FPTO §§ 3–83, 3–84; Exs. USA–20, p. 32; USA–22, p. 17; Exs. H–1, p. 1, *l.* 17–22; H–2, p. 1, *l.* 24 to p. 2, *l.* 5; Ex. USA–31e, pp. 185–188]

40. There are presently fifteen Hoh fishermen, five of whom fish full time and earn on an average $7,000 a year from fishing and ten part-time fishermen who are otherwise employed as loggers and who earn approximately $5,000 a year from fishing. [Tr. 3124, *l.* 23 to 3125, *l.* 19] With the exception of two fishermen, all Hoh fishermen fish on the reservation at permanent set net sites. Two fishermen fish off the reservation because they do not have permanent set net sites on the reservation. [Tr. 3121, *l.* 24 to 3122, *l.* 14; Tr. 3123, *l.* 20 to 3124, *l.* 9]

41. The only portion of the Hoh River that is within the Hoh Reservation is the south half of the river extending one mile upstream from the mouth [Tr. 3121, *l.* 21–23] The Department of Fisheries has promulgated off-reservation Indian-only fishing regulations for the Hoh River. With the exception of weekly closed periods, the regulations allow fishing down stream of the upper mouth of Nolan Creek to the Hoh Indian Reservation boundary from July 1 to November 30 annually. [Exs. JX–2a, Table 16, p. 158, App. II, p. 309; JX–2b, pp. 2–3]

42. The Hoh tribal council has adopted a fishing ordinance designating set net sites, limiting the number and length of nets, requiring daily removal of fish, regulating sales, and providing penalties for violations. [Ex. JX–2b, pp. 2–3; Tr. 3129, *l.* 7–12] Annual regulations are not adopted and estimates of predicted run size are not utilized in regulating the fishery. [Tr. 3136, *l.* 13–20; Ex. F–30, Hoh Tribe's Answer to Interrogatory No. 15] The Hoh ordinance does not make provision for emergency regulations. [Ex. F–30, Hoh Tribe's Answer to Interrogatory No. 11]

Lummi Tribe

43. The Lummi Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes or bands which were parties to the Point Elliott Treaty. This tribe is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Lummi Indian Reservation. Its membership is determined in accordance with its Constitution and Bylaws approved by the Assistant Commissioner of Indian Affairs on April 2, 1948, as amended April 10, 1970. It does not have a current federally approved membership roll but it presently has approximately 1,500 members. [FPTO § 3–12; Ex. Pl–56]

44. The Lummi Tribe is composed primarily of descendants of Indians who in 1855 were known as Lummi or Nook-Lummi and who lived in the area of Bellingham Bay and near the mouth of the river emptying into it. The present Lummi Tribe also includes descendants of the Semiahmoo and Samish Indians of 1855. The Lummi Indians, and the Semiahmoo and Samish Indians who were subsumed under the Lummi designation, were party to the Treaty of Point Elliott. Fourteen of the signatories to that treaty were identified as Lummi Indians. [FPTO § 3–39; Ex. USA–30, pp. 1–5]

45. Prior to the Treaty of Point Elliott, the Lummi, Semiahmoo and Samish Indians had been engaged in trade in salmon, halibut and shellfish both with other Indians and with non-Indians. [FPTO § 3–42] This trade continued after the treaty. [Ex. USA–30, p. 6] At the time of the treaty they maintained prosperous communities by virtue of their ownership of lucrative saltwater fisheries. The single most valuable fish resource was undoubtedly the sockeye, which the Lummis were able to intercept in the Straits on the annual migration of the sockeye from the ocean to the Fraser River. [Ex. USA–30, p. 11] Lummi Indians developed a highly efficient technique, known as reef netting, for taking large quantities of salmon in salt water. [Ex. USA–30, p. 11] Aboriginal Indian "reef

netting" differs from present methods and techniques described by the same term. [FPTO § 3–40] The Lummis had reef net sites on Orcas Island, San Juan Island, Lummi Island and Fidalgo Island, and near Point Roberts and Sandy Point. [Ex. USA–30, p. 23; Exs. USA–62, USA–63; Tr. 1699, *l.* 2 to 1701, *l.* 21] When nature did not provide optimum reef conditions the Indians artificially created them. [Ex. USA–30, p. 17] Reef netting was one of the two most important economic activities engaged in by these Indians, the other being the sale of dog fish oil. These Indians also took spring, silver and humpback salmon and steelhead by gill nets and harpoons near the mouth of the Nooksack River, and steelhead by harpoons and basketry traps on Whatcom Creek. They trolled the waters of the San Juan Islands for various species of salmon. [FPTO § 3–42; Ex. USA–30, pp. 6–25; Ex. G–21, pp. I–19–I–21]

46. In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay. Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay. [Exs. USA–20, p. 39; USA–30, pp. 23–26; Exs. PL–94a, b, c, d, e, t, u, v, w, x; Ex. G–26, pp. II–9 to II–13; Exs. USA–60, USA–61, USA–62, USA–63, USA–64; Tr. 1665, *l.* 4–11, *l.* 23–24]

47. Reef net locations were owned by individuals who claimed proprietary rights by virtue of inheritance in the male line. These locations constituted very valuable properties to their native owners. [Ex. USA–30, pp. 6, 20, 21; Tr. 2036, *l.* 10–16; Tr. 2039, *l.* 19 to 2041, *l.* 20] Some of the Lummi signers of the treaty were owners of reef net locations. Lummi Indians who were present at the Point Elliott Treaty Council later asserted that the Lummi signers had received assurances there that they would continue to hold the rights to their fishing grounds and stations, including their reef net locations. [Ex. USA–30, pp. 6–10; Tr. 2054, *l.* 2 to 2055, *l.* 1]

48. After the treaty the Lummi Indians continued to use their reef net locations until about 1894, when fish traps owned by non-Indians were located so as to render valueless many of the Lummi reef net locations. Some Lummis continued to use locations in the San Juan Islands from the turn of the century to the early 1920's. In approximately 1924 Lummi Indians stopped reef netting at their sites off the west coast of Lummi Island when the cannery to which they had been selling their fish closed. In 1934, when fish traps were prohibited in Puget Sound waters, Indian fishermen again had access to former locations. When a new cannery opened in 1939 Lummi Indians and non-Indians began reef netting again on the west coast of Lummi Island. However, non-Indian fishermen using the reef net technique rapidly occupied the more profitable reef net locations. [Ex. USA–30, pp. 26-27; Tr. 2097, *l.* 21 to 2102, *l.* 3; Tr. 2812, *l.* 22 to 2814, *l.* 10; Ex. PL–2, pp. 169–171, 175; Exs. L–5, p. 4, *l.* 4–7, *l.* 26 to p. 5, *l.* 9; L–6, p. 1, *l.* 29 to p. 2, *l.* 24]

49. The Department of Fisheries issues a reef net license to any non-Indian who applies and pays the fee and to any Indian who applies without a fee. The Department does not determine the site where the license is used nor does the license entitle the licensee to any site. The Department does, however, regulate reef net fishermen by time, area and distance between rows of gears. It does not regulate the number of reef nets or the separation between reef nets and reef net boats within a row.[FPTO § 3–608]

50. There are presently 43 reef nets being operated in Legoe Bay off Lummi Island, arranged in rows arbitrarily numbered from 0 to 9 running north to south. None of these is owned by Lummis. Within each row there are varying numbers of reef net gear at specific positions which are numbered from the shore outward. A number of these rows and some of the positions are vacant and have remained so for many years because the sites are not productive. [Tr. 3674, *l.* 9 to 3677, *l.* 6; Tr. 3714, *l.* 17–19; Tr. 3764, *l.* 5-20; Exs. RN–7 and RN–8] Many of the reef net operators have been fishing in the same locations for

thirty to thirty-five years. Only seven or eight positions of those occupied in 1973 were profitable over a four-year period. [Tr. 3703, *l.* 2 to 3704, *l.* 3; Tr. 3714, *l.* 10–14; Tr. 3744, *l.* 20 to 3745, *l.* 5]

51. Present day non-Indian reef net gear at Legoe Bay is located in part directly on the sites traditionally occupied by the Lummis at treaty times and thereafter. [Ex. L–7; Tr. 3743, *l.* 3–19; Tr. 2928, *l.* 3 to 2929, *l.* 11; Tr. 3756, *l.* 13 to 3757, *l.* 19; Ex. L–1; Ex. L–3; Tr. 3099, *l.* 20 to 3108, *l.*23; Ex. L–4; Tr. 3113, *l.* 3 to 3117, *l.* 1]

52. The location of the reef nets is one of the most critical factors in the success of a reef net operation. [Tr. 3710, *l.* 15-18; Tr. 3748, *l.* 22 to 3749, *l.* 5] Profitable positions are occupied permanently, unprofitable ones abandoned or operated intermittently or experimentally. [Tr. 3702, *l.* 25 to 3710, *l.* 14]

53. Since the turn of the century, the heavier volume of fish in the vicinity of Legoe Bay traveled close to shore. This has changed so that now fish must be taken in deeper water. This has been caused by the installation of traps and the present abundance of other fishing gear in the reef net area. [Tr. 3746, *l.* 20 to 3748, *l.* 20] In aboriginal times, Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time, including operation of the reef nets. [Exs. USA–20, p. 22; USA–52, p. 4, *l.* 25 to p. 5, *l.* 1]

54. All the reef net boats employ the same basic principal developed and used by the aboriginal Lummis, namely creation of an artificial reef to lead the migrating salmon into a net slung between two boats which is lifted when the fish enter the net. [Ex. USA–30, pp. 13–19] Modern gear incorporates numerous refinements and improvements including the addition of electric power to pull the nets. [Ex. RN–1, p. 55, *l.* 6 to p. 67, *l.* 14; Ex. RN–5, p. 15, *l.* 21 to p. 17, *l.* 9]

55. The present reef net operators occupy fixed positions at the reef net grounds in Legoe Bay and maintain a "gentlemen's agreement" among themselves. The agreement is to the effect that an occupant of a

location is entitled to maintain that location to the exclusion of all others. It further provides that no location will be yielded unless to one who agrees to purchase the equipment from the occupant. If the occupant does not desire to sell his equipment no change in occupancy of the location can occur. [Tr. 3681, *l.* 1 to 3682, *l.* 4; Tr. 3704, *l.* 4 to 3705, *l.* 10; Tr. 3717, *l.* 13–22] Reef netters do not voluntarily give up their locations or rotate to any other location. [Tr. 3771, *l.* 19–22]Members of the Reefnetters' Association do not recognize Lummi Indians as having any treaty right to occupy a position on the reef net grounds, and these Indians are, as far as these reefnetters are concerned, in no different position than a non-Indian who would seek to acquire a location. [Tr. 3717, *l.* 23 to 3719, *l.* 20]

56. In years past, the few Lummi Indians who operated reef net boats were gradually squeezed out of the reef net fishery by non-Indian pressure and by physical crowding of boats on Indian locations. [Tr. 2936, *l.* 20 to 2938, *l.* 17; Tr. 2962, *l.* 6–21; Tr. 2963, *l.* 18 to 2964, *l.* 1; Tr. 2966, *l.* 7 to 2967, *l.* 2]No present day Lummis are willing to contest any of the present occupants for possession of a reef net site. [Tr. 3008, *l.* 13–21] The Lummis are not willing to invest money and gear to occupy locations which are not economically productive. [Tr. 3007, *l.* 24 to 3008, *l.* 12] There are Lummi Indians who would be interested in participating in the reef net fishery at Legoe Bay if they could gain access to economically productive locations. [Tr. 2941, *l.* 13 to 2943, *l.* 1; Tr. 3009, *l.* 16 to 3010, *l.* 2] However, they object to having to purchase a non-Indian's fishing gear in order to occupy a good location. [Tr. 3029, *l.* 15–24]

57. Over the years the Lummi Tribe and the Department of Fisheries have often worked together to resolve differences, although never reaching total agreement. [Tr. 3014, *l.* 4–13] In spite of Lummi objections, the Department of Fisheries has opened Bellingham Bay to a heavy gill net commercial fishery which severely depletes the number of fish reaching the Nooksack River, which is

depended upon by the Lummi fishermen for a drift net fishery. [Tr. 2978, *l.* 25 to 2979, *l.* 18; Tr. 3019, *l.* 16–22]

58. At the present time, members of the Lummi Tribe engage in all types of fisheries, including gill netting, purse seining and trolling for salmon on Puget Sound, crab fishing, beach seining for all species, including herring, and drift and set gill netting in the Nooksack River. [Tr. 2974, *l.*17 to 2975, *l.* 13] Eight Lummi fishermen own and operate commercial-size fishing boats and approximately 150 members of the tribe take part in the fishery on the Nooksack River. Fishing is vitally important to the people of the tribe, both for subsistence and a livelihood. [Tr. 2976, *l.* 7 to 2977, *l.* 6]

59. The Lummi Tribe regulates both its river fishery and offshore fishery and requires its members to carry a tribal identification card and abide by tribal regulations. These fishing regulations are enforceable in tribal court and the tribe utilizes its police for enforcement. [Tr. 2977, *l.* 9 to 2978, *l.* 18] The tribe also imposes and collects a tax on its tribal fishermen. [Tr. 2981, *l.* 17 to 2982, *l.* 2] The tribe also operates a hatchery located at Skookum Creek some 15 or 20 miles from the reservation which has planted fish in the Nooksack River which will migrate to the ocean and Puget Sound. [Tr. 3016, *l.* 5–22]

Makah Tribe

60. The Makah Tribe is a party to the Treaty with the Makah. It is recognized by the United states as a currently functioning Indian tribe maintaining a tribal government on the Makah Reservation. This tribe is organized pursuant to section 16 of the said Indian Reorganization Act of June 18, 1934, and is incorporated under section 17 of that Act. 25 U.S.C. § 477. Its membership is determined in accordance with its Constitution and Bylaws approved by the Secretary of the Interior on May 16, 1936. It does not have a current federally approved membership roll but it presently has approximately 900 members all residing at Neah Bay, Washington. [FPTO §§ 3–1, 3–13; Tr. 2519, *l.* 15–16; Ex. PL–57]

61. Makah wealth, power and maintenance of Northwest Coast culture patterns were achieved by and dependent upon a thriving commercial maritime economy which was well established prior to 1855. [Ex. USA–21, p. 30] The Makah Indians, prior to treaty times, were primarily a seafaring people who spent their lives either on the water or close to the shore. Most of their subsistence came from the sea where they fished for salmon, halibut and other fish, and hunted for whale and seal. The excess of what they needed for their own consumption was traded to other tribes for many of the raw materials and some of the finished articles used in the daily and ceremonial life of the village. A special feature of the Makah environment was a rich supply of halibut to which the Makah had access by virtue of ownership of lucrative fishing banks respected by competing tribes, a highly developed technology capable of efficiently harvesting the resource, and intensive processing and marketing of the finished product. [Ex. USA–21, pp. 11–13] At the time of the treaties, the Makahs relied more heavily on halibut than on salmon or steelhead for their diet and trade. [Tr. 1879, *l.* 3–7; Tr. 1907, *l.* 2–6] The Makah imported their basic needs such as housing materials and ocean-going canoes used for sea mammal hunting and ocean fishing because of the peculiarly rich resources available to them in their ocean territories, primarily halibut and whale. In addition to the marine products which the Makahs consumed themselves and sold to other Indians in order to buy native goods, they produced a considerable surplus for sale to whites. [Ex. USA–21, pp. 15, 18; FPTO § 3–47; Ex. PL–9, p. 35]

62. The treaty commissioners were aware of the commercial nature and value of the Makah maritime economy and promised the Makah that the government would assist them in developing their maritime industry. Governor Stevens found the Makah not much concerned about their land, apart from village sites, burial sites, and certain other locations, but greatly concerned about their marine hunting and fishing rights. Much of the official

record of the treaty negotiations deal with this. Stevens found it necessary to reassure the Makah that the government did not intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits. [Ex. USA–21, pp. 36–37] Article 13 of the Treaty with the Makah, however, did prohibit the tribe from trading at Vancouver Island. [Ex. PL–41, p. 419] By his promises of kettles and fishing apparatus to the Makah, Governor Stevens clearly indicated that the treaty commissioners had no intention to restrict the Indians to aboriginal equipment or techniques. The Government's intent to aid the Makah in their whaling, sealing and other fisheries continued after the treaty. [FPTO § 3–44; Ex. PL–41, p. 419; Ex. PL–43, p. 417; Ex. USA–21, pp. 33–39]

63. At the time of the treaty, the Makah Indians maintained separate winter and summer villages, such that residents of one winter village (e.g. Baadah) summered at a specific summer village (e.g. Kiddecubbut). The treaty commissioners did not fully understand this network of summer and winter villages. Prior to, during and after the treaty some of the Makah Indians traveled from their summer villages and in the fall moved to camps which provided access to places for taking fish from the salmon runs in the streams and rivers draining into the Strait of Juan de Fuca. [FPTO § 3–46]

64. The Makah could neither read, write nor speak English. Governor Stevens and his party had the assistance of a Clallam Indian who spoke the Makah language, though Makah is totally different and unrelated to Clallam. The treaty appears to have been translated into Chinook jargon, which has a limited vocabulary and was used primarily for trade purposes, but is inadequate to convey concepts of tenure and tenancy in a legal document. Governor Stevens spoke to the Makah in English which was translated into Chinook by B. F. Shaw, the official interpreter. [Ex. USA–21, pp. 24–25]

65. The Makah's usual and accustomed fishing places prior to treaty time included the waters of the Strait of

Juan de Fuca to Port Crescent (near Port Angeles) extending out into the ocean to an area known as Swiftsure and then south along the Pacific Coast to an area intermediate to Ozette Village and the Quileute Reservation, as well as the rivers along the Strait of Juan de Fuca and down the Pacific shore starting at the Elwha River and including Lyre River, Twin River, Pysht River, Hoko River, Sekiu River, Sooes River, Waatch River, Big River, and Ozette River and Lake Ozette. [Exs. USA-20, p. 30; USA-21, pp. 19-22; Ex. USA-31e. pp. 191-197; Tr. 2521, *l.* 16 to 2522, *l.*, 3, *l.* 21 to 2523, *l.* 2] In addition to their plentiful catches of halibut, at treaty times the Makah took chinook, sockeye, chum and coho salmon at their usual and accustomed fishing places using fishing techniques which included beach seining, spearing and trolling. [FPTO § 3-48] The Makah Indians have continued to assert their use rights to areas of saltwater and freshwater after the execution and ratification of the treaty. [FPTO § 3-45]

66 In aboriginal times the Makah enjoyed a high standard of living as a result of their marine resources and extensive marine trade. With the advent of non-Indians to the area, new markets developed, Makah marine pursuits were intensified and Makah wealth increased. [Ex. USA-21, p 29] The Makah not only sustained a Northwest Coast culture, but also were wealthy and powerful as contrasted with most of their neighbors. They maintained from time immemorial a thriving economy based on commerce. [Ex. USA-21, pp. 32-33]

67. At the present time out of a tribal membership of approximately 900, there are approximately 150 persons engaged in fishing either part time or full time. There are approximately 60 Makah who are steady fishermen. [Tr. 2519, *l.* 15-16; Tr. 2520, *l.* 10-21] There are presently eight boats of commercial size fishing on the high seas. Three of these boats are gill netting in the Strait of Juan de Fuca, four are trolling, and one is tuna fishing. The commercial boats are thirty-six feet in length except that the tuna boat is fifty-four feet in length. [TR. 2523, *l.* 15 to 2524, *l.* 13]

These boats were obtained by the tribe using its resources to acquire the boats and are managed through a tribal corporation. [TR. 2524, *l.* 14-24] These commercial boats go as far as fifty miles out to sea, east to Puget Sound and south to Westport and the Columbia River. [Tr. 2524, *l.* 25 to 2525, *l.* 21] In addition to these larger boats, the remaining Makah fishermen operate small boats ranging in size down to sixteen feet. [Tr. 2524 *l.* 1-4] The Department of Fisheries, after consultation with the Makah Tribe, has adopted fishing regulations for Washington territorial waters north of Cape Alava and west of the Hoko River for an Indian-only fishery. [Tr. 2554, *l.* 17 to 2555, *l.* 8; Ex. JX-2a, App. II, Tabie 3, pp. 311-312]

68. Salmon is a staple food of the Makah Tribe today and is used for all ceremonies and potlatches. In addition to personal use, the Makah depend upon their commercial take of salmon, and logging activities, for economic survival. [Tr. 2528, *l.* 8-19]

69. The Makah Tribe has regulated its fishermen since 1937, and has promulgated written regulations for its reservation and off-reservation fisheries since 1952. [Ex. JX-2b, pp. 10-20; Tr. 2530, *l.* 24 to 2531, *l.* 5] These regulations were drafted by a fisheries committee composed of seven fishermen elected by the fishermen of the tribe and enacted by the Tribal Council. [Tr. 2519, *l.* 25 to 2520, *l.* 7; Tr. 2554, *l.* 1-8] These regulations have not been revised on an annual basis. [Tr. 2554, *l.* 9-16] In setting fishing seasons estimates of predicted run size are not utilized by the fisheries committee. [Tr. 2579, *l.*10-14] The regulations are enforced by a tribal patrolman who warns offenders, and if the offender does not cease violation, he will be taken to tribal court and his nets confiscated. The Makah fishermen carry tribal identification cards. [Tr. 2530, *l.* 24 to 2535, *l.* 25] In addition, the Makah Tribe has established a formal procedure by which it seeks advice relating to conservation from state and federal agencies as guidance in drawing up its marine fishery regulations. [Tr. 2537, *l.* 9 to 2538, *l.* 7]

70. The Fisheries and Game Departments have from time to time prevented the Makah from exercising their treaty fishing rights at usual and accustomed grounds and stations on rivers along the Strait of Juan de Fuca, [Tr. 2522, *l.* 4 to 2523, *l.* 14] and from purse seining off the mouths of the Hoko and Pysht Rivers. [Tr. 2539, *l.* 25 to 2540, *l.* 8] In addition, the state allows sport fishermen to fish at the mouth of rivers fished by the Makah. Sport fishermen fishing in Makah usual and accustomed areas are allowed by state law to fish every day of the week and take up to three fish per day per fisherman. The number of sport fishermen is increasing to the point that they seriously impede the efforts of Makah commercial fishermen in marine waters. These fishermen crowd in on Makah fishing boats when they see them taking fish. This seriously hampers the Makah boats' ability to maneuver and to continue their fishing activity. [Tr. 2543, *l.* 19 to 2546, *l.* 5] In addition, the Makah have had their nets cut, have had holes chopped in their boats and have been shot at by non-Indians. [Tr. 2540, *l.* 19 to 2541, *l.* 7]

Muckleshoot Tribe

71. The Muckleshoot Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is the successor to, and is made up principally of descendants of, tribes or bands which were parties to the Treaty of Point Elliott and the Treaty of Medicine Creek. [Ex. USA–27a, pp. i-vi; Exs. PL–23; PL–66; PL–3; PL–4; PL–41, pp. 417–418; PL–42, pp. 387-388, 392; PL–46, p. 39; Exs. USA–41a, pp. 3–672 to 3–679; USA–41b] It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Muckleshoot Indian Reservation. This tribe is organized pursuant to section 16 of said Indian Reorganization Act of June 18, 1934, and is incorporated under section 17 of that Act. Its membership is determined in accordance with its Constitution and Bylaws approved by the Secretary of the Interior on May 13, 1936, as amended on June 14, 1961, and March 26,

1969. [Ex. PL–58] Its present membership roll was approved by a representative of the Secretary of the Interior on December 15, 1969, and a supplemental roll was so approved on November 27, 1970. The tribe presently has approximately 386 members. [FPTO § 3–14; Exs. PL–48; PL–5; Exs. USA–54, p. 10, *l.* 24 to p. 12, *l.* 23; USA–46c; USA–46g; USA–47; USA–48; USA–56; USA–57; USA–43, pp. 13, 31; USA–44, pp. 1–2, 36; Tr. 1626, *l.* 1–16]

72. The Muckleshoot Indian Reservation was established on land ceded under the Treaty of Point Elliott, by Executive Order of the President on January 20, 1857, pursuant to authority under Article 6 of the Treaty of Medicine Creek, which was the only pertinent treaty then in effect. [Ex. USA–27a, p. vi; Ex. PL–21] The reservation drew its name from its location on Muckleshoot Prairie and not from the name of any Indian group that was placed thereon. Pursuant to authority of the Treaty of Medicine Creek and the Treaty of Point Elliott, Indians from the Green and White River areas who constituted bands which were parties to the Treaty of Point Elliott. [see Ex. PL–9, p. 42] and some Indians from the upriver portions of the Puyallup River who were party to the Treaty of Medicine Creek, were removed to and consolidated on the Muckleshoot Reservation. No aboriginal band or tribe known collectively by the name "Muckleshoot" (however spelled) existed at treaty time. Those Indians who were removed to and consolidated on the Muckleshoot Reservation thereafter became known as the "Muckleshoot Indians" or "Muckleshoot Tribe." On March 30, 1935, the Indians of the Muckleshoot Indian Reservation voted, pursuant to the provisions of the Indian Reorganization Act. 48 Stat. 988, 25 U.S.C. §§ 476 and 479, not to exclude themselves from application from that Act. That Act authorizes "the Indians residing on the same reservation" to organize as a tribal entity under the Act. The Act of June 15, 1935, 49 Stat. 378, 25 U.S.C. § 478b, provides that nothing in the Indian Reorganization Act "shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian

tribe, where such tribe voted not to exclude itself from the application of said Act." [FPTO § 3–14]

73. Acting pursuant to instructions from his superiors in the Indian Service to unite small bands of Indians in Washington Territory under a single head, Governor Stevens designated Seattle as head chief of the Dwamish Indians under which he included the Skopamish, Stkamish, and Smulkamish bands of Indians of the White River and Green River areas. These bands are named in the Preamble of the Treaty of Point Elliott. Although none of the Indian signatories to the treaty is identified with any of those three bands, Chief Seattle's signature on the treaty was treated by Stevens and the United States as being on behalf of all of the bands which Stevens had grouped as Dwamish, including the Skopamish, Stkamish, and Smulkamish. [Exs. USA–27a, pp. i–vi; PL–32; PL–66; G–4, p. 179]

74. The United States, acting by and through the Secretary of the Interior and his duly authorized delegatees, has consistently recognized the Muckleshoot Tribe as the political successor in interest to certain of the Indian tribes, bands or villages which were parties to the Treaty of Point Elliott or the Treaty of Medicine Creek. [Exs. PL–48; PL–5; Exs. USA–54, p. 10, *l.* 24 to p. 12, *l.* 23; USA–46c; USA–46g; USA–47; USA–48; Tr. 1624, *l.* 21 to 1625, *l.* 17]

75. Prior to, during and after treaty times the Indian ancestors of the present day Muckleshoot Indians caught chinook, coho, kokanee, sockeye. chum and pink salmon and steelhead which they ate fresh and cured for winter consumption and for exchange and trade. They used weirs, funnel snares, grills, set nets and spears for this purpose. They operated their weir sites so as to periodically remove lattice sections of the weir thus permitting the salmon to escape upstream to spawn. [FPTO § 3–51; Ex. USA–27b, p. 7]

76. Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot Indians had usual and accustomed fishing places primarily at locations

on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington, and secondarily in the saltwater of Puget Sound. Villages and weir sites were often located together. [FPTO § 3–53; Ex. USA–20, p. 38; Ex. USA–27b, pp. 7–16; Ex. PL–23, pp. 11–12]

77. The State's failure to recognize the Muckleshoot Tribe as a treaty tribe has limited the share of the catch which the Department of Fisheries has tried to make available to that tribe. [Tr. 3629, *l.* 8–12; Tr. 3794, *l.* 12 to 3795, *l.* 18] If it were determined that the Muckleshoot Tribe has off-reservation treaty fishing rights it would be possible to provide that tribe with a greater share of chinook and coho salmon in Lake Washington than is now allowed. [Tr. 3625, *l.* 22 to 3626, *l.* 3]

78. Before the Lake Washington ship canal was constructed in 1916 Lake Washington extended farther south and had its outlet through the Black-Duwamish Rivers. The Cedar River did not empty into the lake, but rather into Black River which no longer exists. At the junction of Cedar and Black Rivers were several winter villages and an important Indian fishery. Black River joined White River to form the Duwamish River and there was another important Indian settlement and fishery at this junction. Farther upstream White River and Green River met and on the land between the forks was the most important and largest upriver settlement and fishery. [Ex. JX–2a, p. 298; Ex. USA–27b, pp. 9–12] The Indians had at least three groups of important weir sites to intercept returning salmon on those rivers. These were destroyed by the changes wrought by the elimination of the Black River and the new flow patterns of the Cedar and White Rivers. The Black River silver salmon run was destroyed, as were some of the other spawning areas around Lake Washington. [Ex. USA–27b, pp. 10–12]

79. The Muckleshoot Tribe has promulgated regulations for its reservation and off-reservation fisheries. [Ex. JX–2b, pp. 21–23] Although the tribe has received

assistance from federal biologists in developing its regulations, the federal biologists have discussed with the tribe, but not provided it, estimates of predicted run size and recommendations of seasons or areas for fishing. [Tr. 1285, *l.* 12–17, *l.* 22–25; Tr. 1348, *l.* 5–11; Tr. 1349, *l.* 18 to 1350, *l.*1] There are presently between thirty-five and fifty Muckleshoot fishermen. [Ex. MS–8, p. 4, *l.* 5–6]

80. There has been cooperation between the Muckleshoot Tribe and the Department of Fisheries, particularly on water problems in the White River, which is one of the major factors affecting the availability of fish in the Indian fishery. [Tr. 3162, *l.* 10 to 3163, *l.* 7; Ex. f–25] Although the Department of Fisheries, pursuant to state court decisions, has not recognized the Muckleshoot Tribe as a treaty tribe, it has provided for a permit fishery for Muckleshoot Indians on Lake Washington and test fishing on the Green and Carbon Rivers. [Tr. 1093, *l.* 16 to 1094, *l.* 6; Tr. 3570, *l.* 14 to 3571, *l.* 15; Tr. 3575, *l.* 23 to 3577, *l.* 4.]

Nisqually Tribe

81. The Nisqually Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes or bands which were parties to the Medicine Creek Treaty. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Nisqually Indian Reservation. This tribe is organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934. Its membership is presently determined in accordance with its Constitution and Bylaws approved by the Assistant Secretary of the Interior on September 9, 1946. It has a membership roll approved by a representative of the Secretary of the Interior on November 3, 1965. The tribe presently has approximately 48 members. A new constitution was adopted by the tribe on June 9, 1973, to become effective upon approval by the Secretary of the Interior. The matter is currently pending before the Secretary. [FPTO § 3–15; Tr. 2635, *l.* 8–14; Ex. PL–59] The Indians who were

assigned to the Nisqually Reservation, including those identified in the treaty preamble as Nisqually and Steilacoom, were thereafter known as Nisqually Indians and were dealt with by the United States as a separate and collective entity. [Ex. USA–25, p. 25]

82. During treaty times the Nisqually Indians recognized separately and harvested the following species or races of anadromous fish: a) Tl'hwai (chum or dog salmon); b) Skowitz (coho salmon); c) Huddo (humpback salmon); d) Satsup (chinook salmon), To-walt (king or tyee salmon) were recognized as Satsup, the basis of distinction being size; e) Skwowl (steelhead). Their fishing techniques included trolling in saltwater, and nets, traps, weirs, gaffs, spears and hook and line in freshwater. Such fish were the Nisqually Indians' most important item of food. They were eaten fresh, were smoked and preserved, and were used for nonfood purposes such as glue base by the Nisqually Indians. The Nisqually Indians also identified several constellations of stars by reference to fish and fisheries. [FPTO § 3–58; Ex. USA—25, pp. 10–21a] The unpublished works of George Gibbs contain at least three notations of a fish trap or fish dam on the Nisqually River involving at least two separate locations. [FPTO § 3–61; Ex. USA–25, p. 22]

83. Dr. George Suckley, who reported information respecting salmon which he recorded from the Indians while he resided at Puget Sound between 1853 and 1856, reported that:

> "* * * the salmon known to the Nisquallies as the *skwowl*, which I consider identical with the *Klutchin* of the Clallums, * * * arrives in the bays and estuaries of Puget Sound about the middle of autumn, and towards the first of December commences to run up the larger rivers emptying into the sound. Their ascent of these streams continue through December and January. This arrival of the species in fresh water is not as simultaneous, neither do they arrive in such great numbers at any one time or in 'schools,' as is the case with the *skourtz* and several other species, but the 'run' being somewhat

more 'drawn out' affords a steady moderate supply to the Indians during its continuance."

He further recorded that, after the skwowl entered the rivers, they were taken by the Indians in nets, traps, baskets, and also by spearing. [FPTO §§ 3–55; 3–56; Ex. PL–50, p. 329; Ex. USA–25, pp. 15–16]

84. Dr. George Suckley reported on some of the uses which the Indians made of different species of salmon in 1853 and 1854. Quoting George Gibbs, Suckley reported that the dog salmon is prefered by the Indians for drying because there is but little fat upon it. [FPTO § 3–57; Ex. PL–50; Ex. USA–25, pp. 17-18]

85. At the time of the Medicine Creek Treaty upriver fisheries in the Nisqually area were normally used by the locally resident group. Saltwater fisheries and fisheries at the mouth of the Nisqually River traditionally were used by visitors as well as the local residents. Visitors might use them because they held claims to them by virtue of kin ties with the local people or they might be accorded guest privileges by virtue of friendship. [FPTO § 3–60; Ex. USA–25, p. 26] Use of the lower Nisqually fisheries by non-Nisqually was with the permission of the local people and would have been accorded automatically to people claiming descent from someone who had come from the local village or who had married into it. People with more distant kin ties to the local village or with none would be accorded fishing privileges on request if amicable relations obtained. [Ex. USA–25, p. 26]

86. The usual and accustomed fishing places of the Nisqually Indians included at least the saltwater areas at the mouth of the Nisqually River and the surrounding bay, and the freshwater courses of the Nisqually River and its tributaries, McAllister (Medicine or Shenahnam) Creek, Sequalitcu Creek, Chambers Creek and the lakes between Steilacoom and McAllister Creeks. The saltwater fisheries were shared with other Indians. [FPTO § 3–63; Exs. USA–25, p. 25; USA–31e, pp. 200–202; Exs. G–23, pp. II–18–19; G–25, p. II–4]

87. Salmon and steelhead continue to be important

to the Nisqually Indians as evidenced by continued fishing activity. [Exs. USA–25, p. 26; USA–69; USA–70] The greatest catch by species from the Nisqually River by Indians is on the chum salmon run. This run is largely unharvested by non-Indian fisheries in Washington waters because it comes through Puget Sound after the commercial fishing has been closed for the season and because chum salmon do not take the sportmen's lures or bait to any significant degree. The chum run is in the Nisqually River at the same time that steelhead are running in the river. Because of this the state has allowed no off-reservation Indian net fishery on this run. [Tr. 3633, *l.* 7 to 3634, *l.* 18; Tr. 882, *l.* 16 to 883, *l.* 25; Exs. F–58; F–59; Ex. JX–2a, App. II, p. 315] The Department of Fisheries' agreement to the prohibition is not based on any concern for preservation of the Nisqually River chum run but upon a request from the Game Department that the prohibition was necessary to preserve the winter steelhead run. [FPTO § 3–607]

88. Pursuant to an understanding between the Department of Fisheries and the Department of Game, the latter Department assumes the lead jurisdictional role over the adoption and enforcement of regulations governing fishing on rivers during the time that steelhead are primarily the anadromous fish in the river. [Tr. 221, *l.* 21 to 223, *l.* 12; Tr. 226, *l.* 11–15] On the Nisqually River the Game Department assumes lead jurisdiction under this understanding on December 1st of each year. The peak of the chum river in the Nisqually River occurs after December 1st and the predominant species in the river during December is chum salmon. [FPTO § 3–607; Tr. 2686, *l.* 5 to 2687, *l.* 11; Ex. JX–2a, Table 49, p. 215 and Table 62, p. 232; Ex. F–6, Table 20, p. 25]

89. The Game Director has testified that his Department would have no objection to the Department of Fisheries allowing the Nisqually Indians an off-reservation gill net season on the Nisqually River for chum salmon during the first weeks of December if the net mesh size is large enough to allow escapement of steelhead through it,

and the run size is sufficient. [Tr. 227, *l.* 2 to 229, *l.* 115] Subject to those conditions being satisfied, the Game Director testified that it may be possible and feasible to regulate an off-reservation Indian net fishery on the Nisqually River to take chum and at the same time conserve the steelhead run. [Tr. 232, *l.* 5 to 233, *l.* 23]

90. The Nisqually Tribe has promulgated fishing regulations for its on and off-reservation fishing areas. [Ex. JX–2b, pp. 24–26; Ex. USA–70, p. 4, *l.* 10–14] These regulations were drawn up by a fish committee composed by tribal fishermen without assistance from federal biologists. [Tr. 2644, *l.* 13 to 2646, *l.* 5; Ex. F–72] The original fishing ordinance was adopted in 1968 and annual regulations have been adopted only since 1972. [Ex. F–33, p. 3, *l.* 17–22] In setting seasons the tribe does not use estimates of predicted run size. [Tr. 2646, *l.* 6–14] There is no formal enforcement procedure and the regulations are presently not being enforced. Violations are presently handled by the fishermen themselves. [Ex. F–33, p. 17, *l.* 8-22]

91. Nisqually Indians today fish with drift and set nets. [Tr. 2646, *l.* 15–20]. There are not enough fishing sites on the Nisqually Reservation to accommodate all Nisqually Indian fishermen. [Ex. F–33, p. 8, *l.* 7–18; Tr. 2689, *l.* 21 to 2690, *l.* 14] Most members of the Nisqually Tribe live off the reservation in the near vicinity to the Nisqually valley. [Ex. F–33, p. 7, *l.* 19 to p. 8, *l.* 6] A number of set net sites are located throughout the stretch of river downstream from the reservation. [Ex. PL–53; Ex. USA–70, p. 6, *l.* 11–16] The locations for these sites change because the river course changes. [Tr. 2652, *l.* 17 to 2653, *l.* 1]

92. The Department of Fisheries has promulgated off-reservation fishing regulations for Indians on the Nisqually river. [Ex. JX–2a, App. II, Table 6, p. 315] The Department and the tribe have discussed issues concerning development of off-reservation regulations, but have not reached agreement on fishing seasons, areas, or times. [Ex. F–33, p. 12, *l.* 23 to p. 13, *l.* 5]

93. There are presently approximately fifty fishermen fishing in the Nisqually Indian fisheries, about twenty of whom fish year-round. [Ex. USA–70, p. 3, *l.* 11–14] Included are approximately twenty members of the Nisqually Tribe, seven to ten of whom fish full time. [Ex. F–33, p. 6, *l.* 14 to p. 7, *l.* 8] The Nisqually Tribe allows non-enrolled members to fish in its treaty fisheries. [Ex. F–33, p. 15. *l.*3–13]

Puyallup Tribe

94. The Puyallup Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes or bands which were parties to the Medicine Creek Treaty. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government. This tribe is organized pursuant to section 16 of said Indian Reorganization Act of June 18, 1934. Its membership is determined in accordance with its Constitution and Bylaws approved by the Secretary of the Interior March 11, 1936, as amended June 1, 1970. It does not have a current federally approved membership roll but it presently has approximately 600 members [FPTO § 3–16; Ex. PL–60]

95. The reference in the Preamble to the Treaty of Medicine Creek to the Puyallup and S'Homamish Bands of Indians was intended to encompass all those groups of Indians living on the Puyallup River, its tributary creeks, and neighboring Vashon Island. After the treaty these people, as well as any others who removed to the Puyallup Reservation, were all subsumed under the single name "Puyallup". [FPTO § 3–67]

96. At the time of the Medicine Creek Treaty communication among upriver Puyallups, people of the Green River-White River-Stuck River area and the upriver Nisquallies was relatively easy. In addition, there was considerable intermarriage and trade contact with Sahaptin-speaking peoples from east of the Cascades. [FPTO § 3–65]

97. Accounts by settlers and others prior to and contemporaneous with the treaties attest to the abundance of fish in the waters utilized by the Puyallup Indians and to the variety of techniques employed by them in taking fish. In the rivers the bulk of the salmon and steelhead was taken in nets associated with weirs, but other important taking techniques included gaffing, falls traps, river seines, and spearing. In the marine areas salmon were taken by beach seining and trolling. These fish were important to the Indians as an item of diet and subsistence, an item of trade, a medium of exchange and a base for such manufactured commodities as glue. [FPTO § 3–68; Ex. USA–26, pp. 8–16]

98. The principal fishing places of the Puyallup Indians were located in the area ceded by these Indians under the Medicine Creek Treaty as well as the area subsequently set aside pursuant to the treaty for their exclusive use as the Puyallup Indian Reservation. [FPTO § 3–73] The land set apart as the Puyallup Reservation as a result of Governor Stevens' 1856 recommendation for relocation of the reservation also was intended to encompass usual and accustomed freshwater fishig sites, and to provide access to traditional fisheries in Commencement Bay for those Indians who were brought to the reservation. [FPTO § 3–69; Ex. PL—75; Ex. USA–26, p. 21; Ex. PL–42, p. 385]

99. The usual and accustomed fishing places of the Puyallup Indians included the marine areas around Vashon Island and adjacent portions of Puget Sound, Commencement Bay, the Puyallup River and the tributary rivers and creeks. In addition, smaller creeks adjacent to but not tributaries of the Puyallup River were used [Exs. USA–20, p. 37; USA–26, p. 21; Ex. G–24, p. II–13] The Puyallup Tribe has enacted regulations applicable to the exercise of its tribal fishing rights. [Ex. JX–2b, pp. 27–34; Tr. 2872, *l.* 25 to 2873, *l.* 3] The regulations provide for a year-round four day per week fishery without annual seasons. There are limitations on open areas and amount and size of gear. Presently there are no emergency

regulations, but the tribal council is authorized to change fishing times, require catch reports and establish registration fees. Predictions of estimated run size are not used in setting the regulations. [Tr. 2879, *l.* 4 to 2880, *l.* 3; Ex. JX–2b, pp. 29–33] Penalties are provided for but there is no formal enforcement procedure. Regulations are enforced by a group of twenty-five to thirty fishermen confronting the wrongdoer and pulling his net out of the water if it is in violation of the regulations. [Ex. JX–2b, p. 33; Tr. 2874, *l.* 9–15; Tr. 2883, *l.* 15–24]

100. Fishing for salmon and steelhead continues to be important to the Puyallup Tribe. [FPTO § 3–74; Tr. 2874, *l.* 16–23] There are between thirty and forty Puyallup fishermen. [Ex. F–33, p. 35, *l.* 1–3; Tr. 2885, *l.* 13–16] These fishermen fish seasonally, mainly between August and January, and earn approximately $5,000 apiece. During the remainer of the year many are otherwise employed. [Tr. 2885, *l.* 17 to 2886, *l.* 16; Tr. 2888, *l.* 17 to 2889, *l.* 7]

101. An Assistant Director of Fisheries testified that Puyallup Indians fishing on the fall chinook run in the Puyallup River have overfished causing a reduction in run size. [Ex. F–28, p. 58, *l.* 29 to p. 59, *l.* 30; Ex. F–4] In 1973 federal biologists concurred with the Department of Fisheries' prediction that the fall chinook run to the Puyallup River would be a low run. The Department of Fisheries closed all commercial fishing under its control on that run including the Puyallup Indian net fishery. The reason for the closure was explained to a federal biologist who agreed that the Department's restriction of fishing on the Puyallup River fall chinook run was necessary for conservation. [Tr. 1394, *l.* 20–24; Tr. 3578, *l.* 18 to 3580, *l.* 20] Although a member of the Puyallup Tribe's fishery committee discussed the low fall chinook run with the federal biologist, the committee did not close the river to its fishermen. Its fishermen continued to fish in the river contrary to state regulation. [Tr. 2881, *l.* 1 to 2883, *l.* 5; Tr. 3580, *l.* 21 to 3581, *l.* 2]

102. At least prior to November, 1973, when

considering whether to authorize any net fishery for Puyallup Indians the Game Department operated on the premise that, as a result of applicable court decisions, Indian fishing anywhere on the Puyallup River was subject to the regulatory jurisdiction of the State. [Tr. 250, *l.* 10 to 252, *l.* 20]

Quileute Tribe

103. The Quileute Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes or bands which are parties to the Treaty of Olympia. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Quileute Reservation. This tribe is organized pursuant to section 16 of the said Indian Reorganization Act of June 18, 1934. Its membership is determined in accordance with its Constitution and Bylaws approved by the Secretary of the Interior on November 11, 1936, as amended March 11, 1949. Its present membership roll was approved by a representative of the Secretary of the Interior on December 26, 1972. The tribe presently has about 450 members. [FPTO § 3–17; Ex. PL–61; Tr. 3192, *l.* 22–24]

104. At the time of the treaty the Quileute (including the Hoh) relied primarily on salmon and steelhead taken in their long and extensive river systems. These Indians were able to take canoes far up into the foothills country by following the river system, not only to take salmon and steelhead, but also to hunt land game in the foothills. [FPTO § 3–77; Ex. USA–22, pp. 9–16]

105. The Quileute reliance on fish as a food staple is reflected in their calendar. Quileute Indian names for some months are related to fish or fishing activities. Translated into English these names and their approximate period of our calendar include the following: "Beginning of the spawning of the steelhead salmon", approximately January (32 days); "regular or strong spawning time of salmon", about February (32 days);

"time for black (chinook) salmon", September; "time for silver salmon", October. [FPTO § 3–79; Ex. USA–22, pp. 13–14]

106. An account of Quileute fishing given September 1, 1916, by Arthur Howeattle, a Quileute Indian, stated that the Quileutes used to fish in rivers, lakes and the ocean and that the fishing grounds in the river were used by individual families and those in the lakes and ocean were used in common. He stated further that fish were caught with drag nets, scoop nets and fish-traps, fish baskets, dip nets, spears, hooks and lines. [FPTO § 3–80; Ex. USA–22, p. 14]

107. Quileute aboriginal fishing gear included a stake trap stretching across a stream with open spaces at intervals in which dip nets were suspended; triangular fish traps which often could catch a canoe-load of fish at a time; and sloping dams across a river along which dip or bag nets were suspended from the downstream side into which the fish would jump in their attempts to get over the dam. [FPTO § 3–81]

108. Before, during and after treaty times, the usual and accustomed fishing places of the Quileute and Hoh Indians included the Hoh River from the mouth to its uppermost reaches, its tributary creeks, the Quileute River and its tributary creeks, Dickey River, Soleduck River, Bogachiel River, Calawah River, Lake Dickey, Pleasant Lake, Lake Ozette, and the adjacent tidewater and saltwater areas. In aboriginal tmes the Quileute Indians utilized fishing weirs where salmon were caught along the Quillayute River. In 1861 James G. Swan encountered fish weirs about a mile up from the bend of the Quillayute River near its mouth and about a mile further upstream. Along the adjacent Pacific Coast Quileutes caught smelt, bass, puggy, codfish, halibut, flatfish, bullheads, devilfish shark, herring, sardines, sturgeons, seal, sea lion, porpoise and whale. [FPTO §§ 3–78, 3–83, 3–84; Exs. USA–20, pp. 31–32, USA–22, pp. 11–21, 25–29; USA–31e, pp. 218–232; USA–53, App. I]

109. Pretreaty Quileute villages were located where

the conditions of the river were best for catching fish and, consequently, each village obtained its principal supply from a trap located nearby. The traps were built in shallow water although not necessarily at the mouths of small streams. [Exs. USA–22, p. 18; USA–31e, pp. 224–225] The fish traps or weirs used by the Quileutes were made of fine maple bows laced by spruce limbs. They entirely closed the streams in which they were built. When the Indians had enough fish for their own immediate needs and to dry for their year's supply, they would remove the weir from the river so that the fish could go up the stream to spawn. [Exs. USA–22, pp. 25–26; USA–31e, p. 222]

110. Fishing is basic to the economic survival of the Quileute people. It is the only resource which the Tribe's members have for making money on the reservation. Fish are distributed freely as gifts and are used in all kinds of ceremonies and celebrations. [Tr. 3193, *l.* 8 to 3194, *l.* 16] Because there are limited locations on their reservation and specifically only one or two places suitable for drift netting, it is necessary that the Quileutes go upstream beyond the reservation boundaries to accommodate all the fishermen. [Tr. 3192, *l.* 10–21]

111. The lowermost 2½ to 3 miles of the Quillayute River are within the Quileute Indian Reservation and the Olympic National Park. The State has no jurisdiction over fishing by Indians in these areas and has not asserted any such jurisdiction. There is, however, a sizeable state-authorized sports fishery for salmon just outside the mouth of the Quillayute River. Historically, members of the Quileute Tribe have fished with gill nets for salmon and steelhead in the Quillayute River both within and upstream from the above-described area and in the lower portions of the Soleduck and Bogachiel Rivers. There is currently an Indian net fishery for both salmon and steelhead within the reservation and national park area. Several of the locations desirable to Quileute Indians for effective set net fishing on the Quillayute River are located upstream from the Olympic National Park in waters under state jurisdiction. Since the creation of the Game

Department the Indians have been permitted to fish in these waters for steelhead only in accordance with state law which totally prohibits fishing for steelhead by means other than angling. [FPTO §§ 3–462, 3–463; Tr. 3199, *l.* 8 to 3200, *l.* 16] The Department of Fisheries has opened the upstream area of the Quillayute River, upstream to about the mouth of the Soleduck River, to net fishing by Indians for salmon from September 1 to November 30. [Ex. JX–2a, Table 17, p. 159; App. II, p. 310; Tr. 3214, *l.* 21 to 3215, *l.* 10]

112. The winter steelhead run in the Quillayute River system commences in strength about December 1 and extends in major strength in the lower portion of the system through March. The Quillayute, Soleduck, Calawah and Bogachiel Rivers are open to steelhead angling under the Washington game laws and regulations generally from about the first of December to the end of February. The portions of those rivers west of U.S. Highway 101 are generally open for an additional period until about April 30, and for an additional period during the summer season. The State licenses guides to take parties of sport fishermen (usually consisting of two fishermen per boat) along the Quillayute River system. Operators of these boats generally charge parties $60 per trip. The operators advertise to attract sport fishermen to fish that river system. [FPTO § 3–462]

113. During the period December through February the Indian catch from the Quillayute River system is predominantly, if not entirely, steelhead. During the 1971–72 run approximately twenty or thirty Indian gill net fishermen fished the Quillayute River but not the entire system. During this time of Indian net fishing, sportsmen have fished the river system both as bank fishermen and as boat fishermen. This sport fishing is mostly upstream from the majority of Indian nets, but at times Indians and sportsmen fish the same stretches of water. Agents of the Game Department have arrested Indians who have fished for steelhead outside of the reservation and national park area in any time, place, and manner other than that permitted by state law. [FPTO § 3–462]

114. Notwithstanding the Indian commercial net fishing on the Lower Quillayute River, catch statistics from punch card data of the upriver sports fishery show an increase in the sport steelhead catch in recent years. This increase could not have occurred unless increased numbers of steelhead had passed through the lower river Indian net fishery.[FPTO § 3–463]

115. At the present time there are 34 full-time fishermen among members of the Quileute Tribe. [Tr. 3192, *l.* 25 to 3193, *l.* 4] These include fishermen who gill net in the rivers and the owners of six boats which engage in off-shore fishing. [Tr. 3191, *l.* 22 to 3192, *l.* 2]

116. The Quileute Tribe has adopted fishing regulations for both on and off-reservation fisheries. [Ex. JX–2b, pp. 42–44; Tr. 3210, *l.* 11–22] The regulations adopted originally in 1941 and revised in 1973 do not provide for annual seasons and do not take run size into account. Estimates of predicted run size are not utilized in establishing fishing regulations. [Tr. 3210, *l.* 11–22; Tr. 3212, *l.* 20 to 3213, *l.* 7] The tribe does impose a tax on its commercial fishermen, the proceeds of which are for the benefit of the general tribal treasury. [Tr. 3200, *l.* 17–24]

117. The Game Department has interfered with Quileute fisheries by seizing nets and threatening arrests for any Indian net fishing for steelhead on the Quillayute River system outside of reservation or national park boundaries from December 1st through June. [Tr. 3195, *l.* 17 to 3197, *l.* 18] The Game Department has held those nets and retains them indefinitely. The Department makes no effort to bring the matter before a court for declaration of a forfeiture. [Tr. 604, *l.* 14–22] State authorities have persistently tried to stop Quileutes from shipping their steelhead to market. The result is that the Quileutes have to ship them by air. [Tr. 3194, *l.* 17 to 3195, *l.* 5]

118. Prior to October, 1973, the Game Department had never considered a regulation to authorize Quileute Indians to maintain an off-reservation net fishery for steelhead, nor had the Game Department staff advised the Game Commission of the data or supporting facts

regarding the Quileute Indian fishery. [Tr. 303, *l.* 14 to 304, *l.* 12; Ex. PL–37]

Quinault Tribe

119. The Quinault Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest of some of the Indian tribes or bands which were parties to the Treaty of Olympia. This tribe is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Quinault Reservation and is composed of the Quinault and Queets Band of Indians, and other fish-eating Indians of the Olympic Peninsula who were allotted on the Quinault Reservation. Its membership is determined in accordance with its Bylaws adopted by its tribal council on May 22, 1965, and recognized by the Bureau of Indian Affairs. It has a membership roll of 986 approved by a representative of the Secretary of the Interior on March 31, 1973. Additional applications for membership are pending. [FPTO § 3–18]

120. The usual and accustomed fishing places of the Quinault people within the case area at treaty time included the following rivers and streams: Clearwater, Queets, Salmon, Quinault (including Lake Quinault and the upper Quinault tributaries), Raft, Moclips, Copalis, and Joe Creek. Ocean fisheries were utilized in the waters adjacent to their territory. [Ex. USA–53, p. 24 and App. 1; USA–31e, pp. 205–214, 233–235A]

121. The Quinault also have important fisheries which were shared with other tribes to the south and east of the boundaries of the case area, especially Grays Harbor and those streams which empty into Grays Harbor. [Ex. USA– 53, p. 24 and App. 1 and 2; Tr. 2817, *l.* 3 to 2818, *l.* 19]

122. At treaty time fishing constituted the principal economic activity of the Quinault. Salmon and steelhead served as the principal food and as an important item of trade. [Ex. USA–53, p. 24] In the immediate post-treaty

period (1860) the government Indian agent recommended that the Quinault Indians be encouraged to open a trade in their salmon as they could be more profitably employed in that way than in agricultural pursuits. [Ex. PL–41, p. 420; Ex. PL–42, p. 391]

123. The lower portions of the Quinault and Queets Rivers run through the Quinault Reservation. There are tribally managed commercial and sports steelhead fisheries within the reservation and a non-Indian-managed recreational fishery for steelhead outside and above the reservation on these rivers. The steelhead resource on these rivers has been maintained without Game Department stocking. The Game Department has not stocked the Quinault and Queets systems because of limitations in their hatchery program and because of opposition by sportsmen's groups, among other reasons. [FPTO § 3–474; Tr. 314, *l.* 20 to 316, *l.* 15; Tr. 3475, *l.* 5–21]

124. The Quinault Tribe has had regulations on its river fisheries since 1916 and tribal fish patrolmen since 1925. [Tr. 3438, *l.* 21 to 3440, *l.* 5] The tribe has on occasion closed its waters to all fishing and prohibited certain types of gear in order to conserve fish runs. [Tr. 3440, *l.* 25 to 3441, *l.* 14; Tr. 3445, *l.* 12 to 3446, *l.* 2] The Quinault Tribe has not had off-reservation fishing regulations because few of its members fish off-reservation in the case area. [Tr. 3475, *l.* 22 to 3476, *l.* 4] Presently only 30 to 40 per cent of the on-reservation fishing sites on the Quinault River are being used. [Tr. 3455, *l.* 22 to 3457, *l.* 17] Any apparent decline in the Quinault sockeye run is probably not due to overfishing by the Quinault Tribe. [Tr. 3530, *l.* 18 to 3532, *l.* 17; Tr. 3551, *l.* 25 to 3552, *l.* 21; Exs. QN–4, QN–5, QN–6 and QN–7]

125. The Quinault Tribe and the tribal technical staff of fisheries scientists and technicians are presently engaged in a comprehensive fisheries management and enhancement program on the reservation. The program includes the production of sockeye, chum, and steelhead from eggs taken by tribal employees, and the cleaning of streams damaged by logging to recover spawning grounds

on the reservation. [Ex. QN–2 and Appendices thereto; Ex. QN–3, pp. 1–11]

126. No special off-reservation fishing season for Quinault Indians has ever been or presently is allowed by the State even though such a season was proposed to the State by tribal officials. [Tr. 3476, *l.* 20 to 3477, *l.* 22]

127. The Quinault Tribe successfully manages its river steelhead run such that both a net commercial and a hook and line sport fishery operate side by side and these uses are not incompatible under the tribal management. [Ex. QN–3, p. 8, *l.* 17 to p. 9, *l.* 14; Tr. 315, *l.* 6 to 316, *l.* 15]

128. The Quinault Tribe is, biologically speaking and from an enforcement standpoint, effectively managing its fisheries resources on the reservation, and is capable of doing so outside of the reservation. [Tr. 3488, *l.* 9 to 3490, *l.* 14; Tr. 3553, *l.* 25 to 3555, *l.* 5]

Sauk-Suiattle Tribe

129. The Sauk-Suiattle Tribe is composed primarily of the descendants of the Sakhumehu and other Indians who lived on the upper reaches of the Skagit River system in 1855. [FPTO § 3–85; Ex. USA–29, p. 12; Ex. USA–58; Ex. UPS–2] Those Indians were party to the Treaty of Point Elliott. [Ex. USA–29, p. 9; Ex. UPS–2, pp. 19–21] A Sakhumehu village was located at the confluence of the Sauk and Skagit Rivers. [Ex. USA–58] The Sakhumehu Indians are named in the preamble to the Treaty of Point Elliott; and one of the treaty signatories is identified as a Sakhumehu. At treaty time the Sauk River Indians, who were known variously as Sock-a-muke, Sakhumehu or Sock a bute, regarded themselves as a distinct and separate group and were so regarded by other Indians and by non-Indians. Their separate identity was consistently recognized in reports referring to them before, during and after the Treaty. Prior to and during treaty times these Indians intermarried to a considerable extent with the Upper Skagit and Stillaguamish Indians. After treaty times some of the Sauk River Indians continued to live along the Sauk and Suiattle Rivers where their descendants still reside. [FPTO § 3–85; Ex. USA–29]

130. No separate reservation was established for a Sauk-Suiattle Tribe in their area. They were permitted to move to reservations established in the general vicinity; and the majority who moved to a reservation moved to the Swinomish Reservation, but most remained in their aboriginal area. The Sauk-Suiattle Tribe is organized and incorporated under the State of Washington Nonprofit Corporation Act (RCW 24.03) and is not organized pursuant to any federal law. [FPTO § 3–19; Ex. Pl–64] The Tribe is recognized by the federal government, but its membership roll has not been approved by the Secretary of the Interior or his representative. [Exs. USA–43, pp. 19, 41; USA–44, pp. 2, 36] The Tribe has approximately 250 members. [Ex. F–30, Sauk-Suiattle Tribe Answer to Interrogatory 44]

131. The usual and accustomed fishing places of the Sauk River Indians at the time of the treaty included Sauk River, Cascade River, Suiattle River and the following creeks which are tributary to the Suiattle River — Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur Creek, Downey Creek, Straight Creek, and Milk Creek. Bedal Creek, tributary to the Sauk River, was also a Sauk fishing ground. [Ex. USA–29, p. 13; Ex. MS–10, p. 3, *l.* 1–6]

132. During treaty times the Sauk River Indians took fish with spears, dip nets, traps and weirs. They procured salmon and steelhead in their upriver region and also traveled to the saltwater to procure marine life unavailable in their own territory. They ate salmon and steelhead in both fresh and cured forms. [FPTO § 3–88] In modern times the Sauk-Suiattle Indian fishermen, numbering only about thirty, have not fished commercially and are primarily interested in a personal use fishery. [Ex. F–42, p. 5, *l.* 4–11 and *l.* 21 to p. 6, *l.* 4, p. 8, *l.* 24 to p. 9, *l.* 2, p. 10, *l.* 12–17, p. 16, *l.* 20 to p. 17 *l.* 2]

Skokomish Tribe

133. The Skokomish Tribe is, with respect to the matters that are the subject of this litigation, a political successor in interest to some of the Indian tribes or bands

which were parties to the Point No Point Treaty. It also includes descendants from some Indians to whom the Medicine Creek Treaty was applicable. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Skokomish Indian Reservation. This tribe is organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934, and is incorporated under section 17 of that Act. Its membership is determined in accordance with its Constitution and Bylaws approved by the Assistant Secretary of the Interior on May 3, 1938, as amended January 12, 1966. Its present membership roll was approved by a representative of the Secretary of the Interior on May 22, 1973. The tribe presently has approximately 416 members. [FPTO § 3–20; Ex. PL–62]

134. The Skokomish Tribe is composed primarily of descendants of the Skokomish and Too-an-ooch who at treaty times lived in the drainage area of Hood Canal. Those two groups were named in the preamble of the Treaty of Point No Point. At that time the two names were used to describe the communities of the upper and lower portions of Hood Canal respectively. These groups were different segments of the Too-an-ooch or Twana group. [FPTO § 3–89; Ex. USA–23, p. 21] After the treaty all Indians of the Hood Canal drainage system, except the Port Gamble Reservation of Clallam Indians, have been referred to by the United States Government as Skokomish. [Ex. USA–23, p. 21]

135. Fishing was the most important food acquisition technique of the Twana Indians during treaty times, and salmonid fish (king, silver, humpback and chum salmon and steelhead) were one of their important sources of food. These fish were eaten fresh, were dried and were smoked for winter use. [FPTO § 3–90] Prior to and during treaty times the Twana Indians accumulated food surpluses with which they supplied feasts for invited guests from as far away as Carr Inlet and Vashon Island to the east and Satsop country to the southwest. [FPTO § 3–91; Ex. USA–23, p. 20]

136. Prior to and during treaty times the Twana Indians located villages for easy access to fishing stations. They took salmon and steelhead in saltwater areas by trolling, spearing and netting, and in freshwater areas by single dam and double dam weirs and similar types of traps. They maintained at least three important weir sites on the Skokomish River during the 1850's. The principal signatory of the Treaty of Point No Point for the Skokomish was in charge of an important weir on the Skokomish River. During treaty times the Twana Indians periodically removed lattice sections of their weirs, thus permitting fish to escape upstream to spawn. [FPTO § 3–92; Ex. USA–23, p. 1]

137. The usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times included all the waterways draining into Hood Canal and the Canal itself. Saltwater trolling and spearing were less important than river fisheries. [Exs. USA–20, p. 33; USA–23, pp. 18–22; Ex. PL–42, pp. 389–390; Ex. USA–31e, pp. 238–244]

138. The Skokomish Indians, despite the fact that they could increase fishing effort on their reservation by utilization of fishing sites not in use, have not in recent years cropped the entire available harvestable portion of the coho run even when asked by the Department of Fisheries to fish harder. [Tr. 2596, *l.* 4–19; Ex. F–28, p. 5, *l.* 8–10; Tr. 3872, *l.* 13–18; Ex. PL–77; Ex. PL–81] It is possible, and in the interest of full use of the resource consistently with conservation, to allow a greater Skokomish Indian fishery, off-reservation in the saltwater areas, on the Skokomish River coho runs than the State presently allows. [Tr. 3872, *l.* 13 to 3874, *l.* 12]

Squaxin Island Tribe

139. The Squaxin Island Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes or bands which were parties to the Medicine Creek Treaty. It is recognized by the United States as a currently functioning Indian tribe

maintaining a tribal government on the Squaxin Island Reservation. This tribe is organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934. Its membership is determined in accordance with its Constitution and Bylaws approved by the Secretary of the Interior July 8, 1965. It has a membership roll approved by a representative of the Secretary of the Interior on April 24, 1971. Its current membership is approximately 175. [FPTO § 3–21; Ex. PL–63]

140. The Squaxin Island Tribe is composed primarily of descendants of the original inhabitants of all the inlets of upper Puget Sound from South Bay on Henderson Inlet around the head of the Sound to North Bay on Case Inlet. Included within this area are: Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley, and Case Inlets. The Indian inhabitants of these inlets were listed separately by local group name in the preamble to the Treaty of Medicine Creek as follows and were included in that treaty: Squawksin, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish. Pursuant to the Treaty these Indians were relocated on the Squaxin Island Reservation and thereafter were dealt with by the United States as a separate and collective entity under the name "Squaxin" (spelled variously). [FPTO § 3–95; Ex. USA–24, pp. 17–18]

141. During treaty times the Squaxin Island Indians fished for coho, chum, chinook, and sockeye salmon at their usual and accustomed fishing placed in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets. Customary use patterns varied according to the types of water areas, with freshwater fisheries being controlled by the residents while the deeper saltwater areas were open to anyone who traveled thereon. Their fishing techniques included trolling, stream weirs, spearing and tidal traps. These Indians continued to fish these areas following their relocation on the Squaxin Island Reservation and to rely in part on fishing for subsistence and monetary income. Salmon fishing and the

fishing areas used by their predecessor bands continue to be important to members of the Squaxin Tribe. [FPTO § 3–98]

142. Through agreement with the Department of Fisheries, the Squaxin Island Tribe has closed fishing on the small streams outside the Squaxin Island Reservation to protect the salmon spawning areas and the tribal fishermen have shifted their treaty fishing into Puget Sound marine areas under a special Fisheries Department season. [FPTO § 3–603; Ex. JX–2a, App. II, pp. 316–317] The tribe has adopted fishing regulations similar to the off-reservation regulations of the Department of Fisheries, and the tribe feels its own regulations are reasonable and necessary for conservation. [Ex. JX–2b, pp. 39–41; Tr. 1048, *l.* 17 to 1049, *l.* 7; Tr. 2488, *l.* 7–15]

143. The Squaxin Island Tribe, with the cooperation of the Department of Fisheries, maintains a rearing program for chinook and coho salmon. It has grown in three years from four floating pens, each twelve feet square, to ten floating pens, each sixty feet square, and from 250,000 to 750,000 fish. The fish, provided in large part by the Department of Fisheries, are raised by the tribe and sold commercially. Some are released into the Sound for the benefit of all fishermen. [Tr. 2485, *l.* 18 to 2486, *l.* 12; Tr. 2493, *l.* 6 to 2496, *l.* 11]

Stillaguamish Tribe

144. The Stillaguamish Tribe is composed of descendants of the 1855 Stoluch-wa-mish of the Stoluch-wa-mish River. The population in 1855 resided on the main branch of the river as well as the north and south forks. The Stillaguamish were believed to number about 200 people in 1855, but the actual number may have been over double that figure. The name Stillaguamish, under various spellings, has been used since about 1850 to refer to those Indians who lived along the Stillaguamish River and camped along its tributary creeks. [Ex. USA–28, pp. 1, 23] They were a party to the Treaty of Point Elliott and are referred to in the preamble of that treaty under the spelling "Stoluck-wha-mish". [Ex. USA–28, p. 15; Ex. PL–

65; Ex. G–4, p. 179; Tr. 2415, *l.* 22 to 2416, *l.* 9] No signatory is identified as belonging to that group, but they were designated as subordinate to Patkanam who signed the treaty as head chief for the Snoqualmoo and associated tribes. [Ex. G–4, p. 179; Ex. USA–28, pp. 15, 23]

145. No separate reservation was established for the Stoluch-wha-mish Indians. They were allowed to move to reservations established in the general area near them and some moved to the Tulalip Reservation, but the majority remained in the aboriginal area along the Stillaguamish River. The membership of the Stillaguamish Tribe is determined in accordance with the tribal Constitution and Bylaws which have been approved by the tribe but have not been approved by a representative of the Secretary of the Interior. [FPTO § 3–22; Ex. USA–28, p. 23] The Stillaguamish Tribe is not recognized as an Indian governmental entity by the federal government. Its enrollment has not been approved by the Secretary of the Interior or his representative and the tribe does not have a reservation. [Exs. USA–43, pp. 21–2 31; USA–44, pp. 2, 36] The Stillaguamish Tribe presently has about 94 members. [Ex. MS–7, p. 4, *l.* 1–2]

146. During treaty times and for many years following the Treaty of Point Elliott, fishing constituted a means of subsistence for the Indians inhabiting the area embracing the Stillaguamish River and its north and south forks, which river system constituted the usual and accustomed fishing places of the tribe. Salmon and steelhead were eaten in both fresh and cured form. These Indians had names for four or five species of salmon, steelhead and other indigenous fish. They took salmon and steelhead by spearing, harpooning, traps and weirs (with dip nets) at various places in those watercourses. The Stillaguamish Indians still consider fishing as a source of food today, and are interested primarily in a personal use fishery. [FPTO § 3–100; Exs. USA–20, p. 38; USA–28, p. 23; Ex. F–43, p. 7, *l.* 5–17; Tr. 2714, *l.* 2–17]

Upper Skagit Tribe

147. The Indian Claims Commission determined, in The Upper Skagit Tribe of Indians v. United States of America, Docket No. 92, 8 Ind. Cls. Comm. 475, 476–77, 491, that the Upper Skagit Tribe is the successor in interest to the rights of an identifiable group of American Indians identified as ten separate villages on the Upper Skagit and Sauk Rivers in treaty times and subsequently known as "the Upper Skagit Tribe". These antecedents of the Upper Skagit Tribe were signatory parties to the Treaty of Point Elliott. [Ex. G–17 (*l*), p. 477; Ex. G–4, p. 180] No separate reservation was established for the Upper Skagit Indians in their area. They were permitted to move to reservations established in the general vicinity. Most of those who moved to a reservation moved to the Swinomish Reservation, but the majority remained in their aboriginal area. The membership of the Upper Skagit Tribe is determined in accordance with articles of Association adopted in 1962. The tribe is not organized pursuant to any federal law. [FPTO § 3–23; Ex. UPS–2] No enrollment has been approved by the Secretary of the Interior or his representative. [FPTO § 3–23; Ex. UPS–2; Exs. USA–43, pp. 24, 31; USA–44, pp. 2, 36] The tribe has approximately 500 members. [Tr. 3254, *l.* 4–7]

148. At treaty time, the usual and accustomed fishing places of the Upper Skagit Tribe included numerous areas along the Skagit River, extending from about Mt. Vernon upstream to Gorge Dam. [Tr. 3272, *l.* 25 to 3276, *l.* 17] Today the tribe has about thirty fishermen, interested primarily in a subsistence fishery. [Tr. 3254, *l.* 8 to 3255, *l.* 1]

Yakima Nation

149. The historical background information concerning the Yakima Nation, as shown by the written testimony (Exhibits Y–13 and Y–26) and oral testimony of Yakima tribal members educated in Yakima history and customs by tribal elders, was not controverted in the evidence and is found by the court to be reasonable and credible factual

data regarding relevant aspects of Yakima Indian life at and prior to treaty time, including the Yakima treaty council and the intentions and understandings of the Indian representatives there present.

150. The Yakima Nation is a party to the Treaty with the Yakimas. [Ex. Y–6] It is recognized by the United States as a currently functioning Indian tribe composed of the tribes and bands consolidated into the Yakima Nation by that treaty and maintaining a tribal government on the Yakima Indian Reservation, located in South Central Washington. Its membership is determined in accordance with the provisions of the Act of August 9, 1946, 60 Stat. 968, 25 U.S.C. §§ 601–607 [Ex. Y–7] and its membership roll is kept current and is approved by a representative of the Secretary of the Interior. It presently has approximately 6,040 enrolled members. [FPTO § 3-24; Ex. Y–13, p. 2, *l.* 30 to p. 3, *l.* 12; Tr. 3292, *l.* 19 to 3294, *l.* 2]

151. In the main, at the time of the treaty, the Indians who were parties to the Yakima Treaty lived in a food gathering culture. They existed on game, fish, roots, berries and some cultivated vegetables. Of these foods fish was a major food and they landed salmon, steelhead, trout, mussels, eel, and other miscellaneous fish. Salmon, however, both fresh and cured, was a staple in the food supply of these Indians. It was annually consumed by these Indians in the neighborhood of 500 pounds per capita. Circumstances necessitated that large quantities of fish, fish oil, roots and berries be cured in adequate quantities to insure a sufficient and balanced diet for those periods of the year when the fresh supply of these commodities was not available. Quantities of fish in considerable numbers were preserved for future use through smoking and drying. The choice of the method depended on the climatic conditions and the availability of firewood. It was customary for these Indians to manufacture pemican. This was accomplished by pounding the dried strips of fish until quite fine and packing the resultant mass in containers lined with fish skin. In this process oil was used where available and the oil from male

steelhead was used for this purpose. Because of the monotony of this fish diet, variety in the kind of salmon and other fish caught was a desired goal. [FPTO § 3–102]

152. With the exception of the spear, gaff and like gear which to a great extent depended on the skill and dexterity of the individual operator, methods used by the Yakima Indians to land salmon and steelhead were very efficient. These Indians used traps, weirs, nets, gill nets, baskets, and seines to land salmon and steelhead. They were proficient in the manufacture of strong twine from native materials. [FPTO § 3–103]

153. Indians from the Yakima Nation and particularly those from the Yakima, Klickitat, Wenatchee, Columbia, Chelan, Entiat and Kittitas aboriginal groups communicated continually with the tribes on Puget Sound by the use of the Snoqualmie, Naches and Stevens Passes as weather permitted. This continual communication created bilingualism, custom interchange, intermarriage and utilization of the natural resources in the Puget Sound area. In the main this communication and intermarriage was with the tribes now considered Nisqually, Puyallup, Muckleshoot and Snoqualmie. [FPTO § 3–104] The Yakimas in the Puget Sound area were intermarried as far north as the Skokomish and controlled them to a certain extent. Gibbs in his treaty time census placed approximately 400 Yakimas in the case area. [Exs. Y–15a and Y–15b; Tr. 2132, *l.* 10 to 2133, *l.* 10]

154. At the time of the treaties the Indians of the Yakima Nation used fisheries located in the Puget Sound area for the purpose of obtaining salmon and steelhead primarily for their use. [Ex. F–35, p. 9, *l.* 10 to p. 10, *l.* 14; p. 11, *l.* 15–19; p. 13, *l.* 3–7]Some of these fish taken by Yakimas were consumed by them and some were traded to other Indians. [Ex. Y–13, p. 9, *l.* 7–9; Tr. 3299, *l.* 4–7]They took these fish there by the consent of the tribes in that region. Since there was more intermarriage and communication with those Indians now called Nisqually, Puyallup, Muckleshoot, and Snoqualmie, fisheries in their area of residence were more commonly used by members of the

Yakima Indian Nation. These fisheries in the area of this case's inquiry included the waters of the Snoqualmie, Snohomish, Green, Puyallup, Nisqually, Stuck, Duwamish, White, Carbon, and Black Rivers and their tributaries [FPTO § 3–105]

155. There had been little non-Indian contact with the Yakimas prior the the treaty negotiations. [Ex. Y–26, p. 7, *l.* 4 to p. 8, *l.* 24] The Indians who were subsumed into the Yakima Nation spoke three different languages, Sahaptin, Salish and Chinookan and had many dialects within the two principal language groups. [Ex. Y–26, p. 7, *l.* 9–13] The treaty negotiations were translated from English or one of these three groups or numerous dialects into Chinook jargon [Ex. Y–26, p. 9, *l.* 9–10; Ex. D–1, p. 24, *l.* 26–30] which has a limited vocabulary and contained none of the words "citizens", "territory", "state", "regulations", "commercial", and "usual and accustomed". [Ex. Y–21; Ex. G–29(a); Tr. 3393, *l.* 11 to 3394, *l.* 1] This jargon was used principally for trade purposes and was inadequate to convey the legal concepts involved. [FPTO § 3–37]

156. At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising. [Ex. Y–13, p. 8, *l.* 6–15; Ex. Y–26,p. 8, *l.* 29 to p. 9, *l.* 8; Tr. 3295, *l.* 16 to 3297, *l.* 8] The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians' understanding of the meaning of the treaty. [Ex. Y–13, p. 8, *l.* 16–23]

157. After the treaty was concluded, the Yakima Indians continued to fish as they had. During territorial times officials of the United States and Washington Territory took the position that the off-reservation fisheries were those the Yakima Indians had exercised at treaty or pretreaty times. These officials took the position that the words of the treaty reserved to the Yakima Indians "the right to enjoy all of these fisheries as they had

heretofore." [Ex. Y-23, p. 10] The Supreme Court of Washington Territory not only sustained this interpretation of the treaty but took notice as a matter of common knowledge that the Yakima Indians were "tenacious" in adhering to these past customs and traditions. [Ex. Y-23, p. 10]

158. The Yakima Indians have continued to assert their off-reservation fishing rights, [Tr. 611, *l.* 21 to 612, *l.* 4 and *l.* 14 to 615, *l.* 15] including fisheries in the case area. [Tr. 3321, *l.* 10-18] The salmon and steelhead landed were consumed or sold commercially. [Ex. Y-13, p. 9, *l.* 13-16] Arrests of Yakima Indians in the case area since 1966 have caused Yakima fishermen to decrease their fishing effort in that area. The Yakima Nation has not encouraged its fishermen to fish in the case area as time and money limitations would not allow the tribe to protect its fishermen from conviction though the tribe's efforts had been successful as regarded other state arrests. [Ex. Y-13, p. 9, *l.* 15 to p. 10, *l.* 7]

159. The Yakima Nation has promulgated fishing regulations for its members in areas east of the Cascade Mountains but has no fishing regulations within the case area. [Ex. JX-2b, pp. 54-61; Tr. 3302, *l.* 22-24] The Yakima off-reservation fisheries in the Columbia river area are regulated. Prior to 1953, and thereafter in areas where the fishing was not intensive, regulation was by Indian leaders at the site. [Ex. Y-13, p. 10, *l.* 12 to p. 11, *l.* 1; Tr 3307, *l.* 12 to 3308, *l.* 19] Since 1953 the Yakima Nation has regulated by written regulations. [Ex. Y-13, p. 11, *l.* 4-12] These regulations provide for annual review, emergency closures, off-reservation enforcement and identification cards. [Tr. 610, *l.* 6 to 611, *l.* 18; Tr. 3291, *l.* 15 to 3292, *l.* 22] Untended fishing gear is identified by tags issued by the Yakima Nation. [Tr. 3328, *l.* 25 to 3329, *l.* 6] The Yakima Nation, through its Tribal Council and its Fish, Wildlife, Law and Order Committee which has an annual budget currently exceeding $400,000.00, gathers biological and other information with assistance from federal biologists, and holds meetings with its fishermen

and others interested before setting seasons or passing other conservation regulations. [Ex. Y-13, p. 2, *l.* 5-24, p. 11, *l.* 13-16; Tr. 1618, *l.* 3 to 1619, *l.* 6; Tr. 3300, *l.* 8 to 3301, *l.* 10] The tribal regulations are enforced by a large law and order department. [Ex. Y-26, p. 2, *l.* 10-29]

160. The Yakima Nation expects its fishermen to respect the regulations of the tribes in the case area. [Ex. Y-13, p. 11, *l.* 19-24] Should further regulation be necessary the Yakima Nation has expressed its intent to confer with other tribes in the area for the purpose of joint regulation, but if the latter did not protect the fishery then the Yakima Nation's expressed intention is to enact conservation regulations of its own covering the case area. [Tr. 3303, *l.* 18 to 3305, *l.* 5] It is likewise the expressed policy of the Yakima Nation in its scheme of regulation to provide for commercial, subsistence and ceremonial landings of salmon and steelhead by net where the fishery will sustain the pressure. Where in the tribe's opinion the fishery will not sustain the pressure, it is the announced policy of the tribe to provide for the following priorities: 1) ceremonial landings; 2) subsistence landings; and 3) commercial landings. [Tr. 956, *l.* 1 to 957, *l.* 17] The Yakima Nation has had successful experiences in joint tribal regulation on the Columbia River [Tr. 3329, *l.* 7-23] and joint regulation with the state and federal government on the Klickitat River. [Ex. Y-13, p. 11, *l.* 25 to p. 12, *l.* 4]

161. Yakima landings for at least ceremonial and personal use in the case area can take place without jeopardizing the continued existence of the fish resource. [Tr. 957, *l.* 25 to 958, *l.* 12; Tr. 959, *l.* 13 to 960, *l.* 5]Yakima tribal regulation of Yakima fishermen at usual and accustomed places in the case area is a matter of genuine interest to the tribe. [Tr. 295, *l.* 1-9; Tr. 960, *l.* 6-23]

162. The Yakimas continue as a religious rite not only the first salmon ceremony but the basic, undying salmon culture existing in this northwest area, and this religious concept of the interdependence and relatedness of all living things is a dominant feature of their lifestyle. [Ex. Y-13, p. 7, *l.* 1-23; Tr. 3297, *l.* 9-15; Tr. 3352, *l.* 17 to 3353, *l.* 2; Tr. 3402, *l.* 7-10]

163. The Yakima Indians have been and continue to be very dependent on anadromous fish to sustain their way of life. [Ex. Y-13, p. 13, *l.* 25 to p. 14, *l.* 2; Ex. Y-10, pp. 31-36; Ex. Y-12, pp. 12-16] They live close to the poverty level and have not reached economic or social parity with non-Indian citizens of the State of Washington. [Ex. Y-13, p. 4, *l.* 13 to p. 5, *l.* 20; Ex. Y-10, pp. 16-26; Ex. Y-9, pp. 2-8; Ex. Y-8, pp. 1-4] Anadromous fish are vital to the Indians' diet with approximately 2,000 of the enrolled members fishing for personal consumption. Approximately four hundred tribal members fish commercially for the most part in the Columbia River area, with only about five Yakima commercial fishermen in the case area. [Tr. 3340, *l.* 5-11]

GENERAL FISHIERIES CONSERVATION AND MANAGEMENT

164. A great many of the biological, fisheries management, and fisheries harvest facts relevant to the issues in this case are set out in Exhibits JX-2a and JX-2b, which are an extensive Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsula Drainage Areas of Western Washington dated May 14, 1973, prepared for this case by staff biologists of the Washington Department of Fisheries, the United States Fish and Wildlife Service, and the Washington Department of Game. The contents of said report are hereby incorporated by reference as Findings of Fact herein. [FPTO § 3-400]

165. On June 16, 1973, the United States exercised its right to terminate the recognition given to Canadian fishermen to fish in the contiguous zone (established by 16 U.S.C. §§ 1091-1094) off the coast of Washington south of Carroll Island located at approximately 48° north latitude. (Cf. Ex. JX-2a, § 2.12, pp. 100-101) [FPTO § 3-401]

166. The principal river systems, marine waters and Indian reservations in the case area are depicted on the base map (Exhibits JX-1a and 1b and JX-2a, p. ii) There

are numerous lesser streams that are important producers of salmon and steelhead. Many of these are depicted on Exhibit F-71. [FPTO § 3-400; Ex. JX-2a, § 1.2, pp. 9-12; Tr. 749, *l.* 24 to 774, *l.* 18; Tr. 3592, *l.* 11 to 3593, *l.* 8]

167. Under Washington State law the protection and management of those fish which the State has classified as food fish is under the jurisdiction of the Department of Fisheries headed by a director who is appointed by and serves at the pleasure of the Governor. Salmon are classified as food fish under current Washington law. The Defendant Thor C. Tollefson is the Director of the Fisheries Department, and as such is vested with the authority to exercise all of the powers and duties of that department, including the authority to issue regulations pursuant to state laws and to enforce said laws and regulations. [FPTO § 3-25; Ex. JX-2a, § 2.5, p. 67]

168. Under Washington law, the protection and management of those species of fish which the state has classified as game fish is under the jurisdiction of the Department of Game which consists of the State Game Commission and the Director of Game. [FPTO § 3-26; Ex. USA-39, p. 1; RCW 77.04.020] The Game Commission is the entity which has the authority to adopt rules and regulations governing the time, place and manner of taking game fish. [Ex. USA-39, p. 8; RCW 77.12.040] The Game Commission consists of six part-time commissioners having the qualifications prescribed by RCW 77.04.040 appointed for staggered six-year terms by the Governor. Three commissioners must come from west of the Cascade Mountain summit and three from the east of that summit. The director is appointed by and serves at the pleasure of the Commission. Defendant Carl Crouse is the Director of the Department of Game. Steelhead are classified as game fish under current Washington law. [FPTO § 3-26] In 1925 the state legislature declared steelhead a game fish when taken in fresh water. Previously state fisheries legislation had defined "salmon" as including steelhead. After 1925 the State imposed progressively greater restrictions on the commercial dealings in steelhead and in

1933 steelhead came under the full protection of the State Game fish regulations. [Ex. JX–2a §§ 2.3.1 and 2.3.2, pp. 60–63; Ex. PL–2, pp. 164, 168; Ex. G–15, p. 3, *l.* 25–32]

169. Fisheries management takes into consideration both the resource itself and the objectives and needs of the societies which control and seek to utilize it. The commercial, sport and Indian fisheries are managed for different use objectives and user interests. Accordingly, the objectives of fisheries management vary in accordance with the purposes and constituency for which the particular fishery is being managed. Commercial fisheries are managed to achieve a maximum sustained yield in terms of food and economic profit, whereas sport fisheries are managed to obtain a maximum sustained recreational experience and a high yield of personal use food and "trophy" product. The Indian tribes have as their primary use objectives the fostering of Indian economic well-being, the preservation of Indian cultural heritage and way of life, and the provision of a significant element of Indian diet. [Ex. JX–2a, § 2.1.0, pp. 47–48]

170. Although the need for management of the fisheries resource, and the methods used, depend upon biological analyses, the actual techniques, like the ultimate objectives, involve political and economic considerations. [Ex. JX–2a, § 2.2.5.3, p. 58] Similarly, economic and political considerations are also used to determine who will harvest varying portions of the resource. The Department of Fisheries recognizes that Indians are a user group with legitimate interests in the fisheries. [Tr. 799, *l.* 2 to 801, *l.* 6; Ex. PL–89] One method, which is favored by some fisheries biologists, of providing an acceptable measure of balance between resource users is to limit entry into the commercial salmon fisheries. However, the Washington legislature has not authorized this. [Ex. PL–89]

171. The anadromous fishery resource is both perishable and renewable. Thus, while an over-harvest would impair its renewability, an under-harvest during a limited time it is available would result in an irreplaceable

waste of the resource. [Ex. JX–2a, § 2.1.0, p. 47] In addition to being wasteful, over-escapement of fish on the spawning ground can impair the renewability of the resource by causing a condition called "superdeposition" where the last fish that comes in and spawns either spawns directly over the first brood of eggs that were in the redds, or digs them up. Superdeposition can destroy eggs outright and also increase the susceptibility to disease of the eggs remaining. [Tr. 859, *l.* 21 to 860, *l.* 15] Salmon and steelhead frequently spawn in the same areas of the various river systems. [FPTO § 3–453]

172. Managing the commercial fishery for maximum sustained profit requires, among other things, that the harvest occurs near the time when the available "crop" has obtained maximum bulk and quality. These do not necessarily coincide in time and place. Thus the proper time for commercial harvest corresponds most nearly to the relatively brief period of time when the fish are full grown and returning to or entering their natal stream to spawn. Net fishery seasons permit the efficient taking of mature or nearly mature fish for commercial purposes during this time period only. [Ex. JX–2a, § 2.1.1, p. 48]

173. Managing sport fisheries for maximum sustained recreation requires providing ample opportunities for fishing. Long seasons, economically and geographically accessible waters, and high catches per individual effort all increase recreational yield. Feeding and growing salmon in the ocean and Puget Sound are of greatest recreational value because they are vulnerable to sport gear over long periods. On the spawning migration route from their saltwater feeding areas, full-grown salmon are available to anglers for only a short period of time. Feeding activity of these latter fish diminishes or ceases as they complete their saltwater migration period. The efficiency of angling gear is them measurably decreased. In some Puget Sound areas where are in or approaching their natal estuary, the catch rate is commonly one-tenth that of the ocean fishery. In contrast to salmon, steelhead actively feed throughout their entire migration route and are readily available to

sport gear in freshwater areas. They are not generally taken by sport gear in saltwater. [Ex. JX–2a, § 2.1.2, pp. 48–49]

174. Management for Indian objectives is closer to commercial management than to sport inasmuch as pursuit of an economic livelihood and the efficient procurement of a food supply are major purposes. In addition, salmon and steelhead have special significance in the religious and cultural mores of the Indian people. Because of traditions, treaty provisions, and location of Indian communities, the Indian fisheries are largely place-oriented. Management for Indian fishery objectives must consider this factor. [Ex. JX–2a, § 2.1.3, pp. 49–50]

175. The Department of Fisheries has not regarded the salmon sport fishery in Puget Sound and on the ocean as a major regulatory concern, because, as compared with the commercial net fisheries, the sport fisheries do not need to be managed on a day-to-day basis. [FPTO § 3–581]

176. Among the plaintiff Indian tribes only a few today are active in marine fisheries. The Makahs and Quileutes have troll fisheries off the coast. The Makahs also pursue both troll and gillnet fishing in the Strait of Juan de Fuca. The Lummi Indians use gill nets in Puget Sound. The Squaxin Island Indians conduct gill net fisheries in the saltwater inlets of the mainland near their reservation. [Ex. JX–2a, § 3.3.6, p. 128] Indian river fisheries are currently exercised at the mouths and varying distances upstream from the mouths of coastal and Puget Sound rivers. Among the rivers so utilized are the following: Nooksack, Skagit, Stillaguamish, Green, Puyallup, White, Nisqually, Skokomish, Sekiu, Hoko, Sooes, Waatch, Ozette, Quillayute, Hoh, Queets and Quinault Rivers. [Ex. JX–2a, § 3.3.7, p. 129] Indian river fisheries take place in confined areas where there are concentrated passages of fish which may require careful regulation to protect the run. [Ex. F–28, p. 8, *l.* 10–15] Where escapement requirements thought necessary by the Department of Fisheries have been achieved, it has been

by stringent control of harvest near or in the parent streams. [Ex. JX–2a, § 2.6.2.0, p. 73]

177. From a broad biological and managerial standpoint, conservation of fish resources means to protect and improve the habitat that produces the resource, to manipulate stocks of fish to achieve necessary spawning escapement so as to maintain, perpetuate and enhance the resource, and to put the harvestable portion of the resource to beneficial use. [Tr. 1049, *l.* 12–19; Tr. 1472, *l.* 1–9] This concept of conservation must be considered in the light of the entire regulatory pattern because all harvesting regulations that restrict time, place and manner of taking fish are interrelated in their application to competing user groups. [Tr. 1055, *l.* 4 to 1056, *l.* 8; Tr. 1480, *l.* 6–12; Ex. F–27, p. 4, *l.* 30 to p. 5, *l.* 1; Tr. 1476, *l.* 9–16]

178. Assuring proper spawning escapement is the basic element of conservation involved in restricting the harvest of salmon and steelhead. Once that has been achieved, the regulations on time and manner of fishing are designed to facilitate the harvest of the excess and distribute it among users in a manner consistent with meeting use objectives of the people who are going to harvest. [Tr. 1160, *l.* 17 to 1165, *l.* 3; Ex. F–28, p. 35, *l.* 30 to p. 36, *l.* 8]

179. Under the present complex harvest scheme used by the State to manage the fish resource, regulation has three main purposes: 1) to preserve the fish stocks; 2) to attain the maximum sustained yield; and 3) to provide an orderly fishery. To accomplish these purposes, all the runs and races of fish that spawn in the various streams of the Puget Sound and coastal areas should be recognized. In order to regulate effectively, the State finds it desirable to have: 1) accurate catch and escapement statistics on all races; 2) a forecast of run size; 3) estimates of the number of spawners that can be accommodated in the streams used for spawning; and, 4) information on the number of units of gear, their efficiency, and the fishing time needed to make the catch. [Ex. JX–2a, § 2.2.5.0, pp. 54–55]

180. Regulations designed to preserve fish stocks by limiting the harvest to ensure run survival can be grouped into two major categories: 1) those designed to protect selected portions of a stock of fish, and 2) those designed to limit the size of the take. Net restrictions, closed areas, closed seasons and size and weight limits are examples of regulations designed to protect selected portions of a fish stock. Limitations by quota in a very few special situations, limitation of the number of fishing units, and limitation of gear efficiency are examples of regulations designed to limit the size of catch. [Ex. JX–2a, §§ 2.2.5.0, 2.2.5.1, 2.2.5.2, pp. 55–57]

181. It is necessary for the fishing activity of Indians and non-Indians to be regulated in order to assure that conservation of the fishery resource is achieved. [Ex. F–28, p. 4, *l.* 14–23; Ex. F–35, p. 24, *l.* 12–26; Tr. 3465, *l.* 22 to 3466, *l.* 9] Observance of fishery regulations is important to the achievement of conservation of the resource. A regulation is more likely to be observed if it is simple to understand, reduces conflicts between interest groups, appears fair to, and wins the confidence of, the fishermen. For this reason, regulations which have as their purpose the attainment of an orderly fishery can be helpful in achieving conservation. [Tr. 1092, *l.* 17 to 1093, *l.* 15]

182. Salmon run sizes fluctuate from year to year, and it is generally necessary for the conservation of a particular salmon run that the regulation of the harvest on that run take into account the run's size. Catch fluctuations generally correspond with run size fluctuations. [Ex. F–28, p. 17, *l.* 3 to p. 18, *l.* 2; Tr. 1067, *l.* 10–19; Tr. 1373, *l.* 13 to 1374, *l.* 2; Tr. 3583, *l.* 6 to 3585, *l.* 6] In order to take run size into account, regulations will be more effective if they are based on estimates of predicted run size, adopted annually, and provide for emergency clauses so that as the runs return the regulations can be made to reflect their actual condition. [Tr. 1374, *l.* 10–16] Conversely, spawning escapement should be a fixed number of fish and should not fluctuate with varying run sizes. [Tr. 1070, *l.* 5–23; Tr. 1419, *l.* 25 to 1420, *l.* 6; Tr. 1446, *l.* 19–25]

183. The State does not limit the number of sport fishermen, either resident or nonresident, who may fish for either salmon or steelhead or the number of commercial fishermen who may fish for salmon in waters under its jurisdiction. [Ex. JX–2a, § 2.2.5.2, p. 57; Tr. 172, *l.* 14–19] In 1971 nearly four times as many persons obtained Washington punch cards to sport fish for salmon as obtained them to sport fish for steelhead. [Ex. JX–2a, § 3.2.7, p. 125, § 3.5.4, p. 137]

184. The State of Washington, by statute and regulation, has set aside the steelhead for the use and benefit of a special interest category of persons. Its limitations on the means by which, the purpose for which, and the numbers which any person can take of this species are designed to promote the use of this fish solely as a recreational attraction for residents of the state and non-resident tourists. [FPTO §§ 3–428, 3–436, 3–469; Tr. 112, *l.* 11–23; Tr. 1652, *l.* 3–13]

185. At the present time, the Department of Fisheries cannot completely control the ocean harvest of chinook and coho salmon because most of these fish are caught in waters beyond the state's jurisdictional three-mile limit. [Tr. 1144, *l.* 18–25; Tr. 3208, *l.* 11–13; Tr. 3505, *l.* 11 to 3506, *l.* 5; Tr. 3941, *l.* 21 to 3942, *l.* 2; Ex. F–32, p. 20, *l.* 9–13] A restriction on the ocean troll fishery in Washington waters probably would not greatly increase the number of chinook salmon returning to Puget Sound because Puget Sound chinook salmon migrate north out of the Strait of Juan de Fuca. [Ex. JX–2a, Fig. 7, p. 241] Canadian fishermen, fishing outside Washington territorial waters, are harvesting an estimated 65 per cent of Puget Sound-origin chinook and over 50 per cent of Puget Sound-origin coho salmon. [Ex. F–28, p. 13, *l.* 7–15; Ex. F–32, p. 11, *l.* 4 to p. 12, *l.* 1; Tr. 3603, *l.* 1 to 3604, *l.* 2] Seventy-five per cent of the ocean catch of Olympic Peninsula-origin chinook salmon occurs off the coast of British Columbia and southeastern Alaska. [Ex. JX–2a, § 1.6.2, p. 29] Ninety per cent of the ocean catch of Puget Sound-origin chinook salmon occurs off the coast of

British Columbia and southeastern Alaska. [Ex. JX–2a, § 1.6.3, p 29–30] Fifty per cent of the ocean catch of Olympic Peninsula-origin coho salmon occurs off the coast of British Columbia. [Ex. JX–2a, § 1.6.7, p. 33].

186. Exhibits F–7 through F–17 show the average annual distribution of catch in all waters of salmon from rivers on which there are Indian fisheries in the case area, excepting the Quinault and Queets Rivers, for all species in the period 1965–1970 and for pink salmon in the odd years from 1959 to 1969. [Exs. F–7 through F–17; Ex. F–28, p. 32, *l.* 3 to p. 33, *l.* 9; Tr. 1180, *l.* 20–23] On an average the following percentages of harvest from the respective stocks in these rivers during this period occurred in waters outside the territorial jurisdiction of the State of Washington: chinook, 58.9%; coho, 55.3%; pink, 29.4%; chum, 2.6%. [Ex. F–7] Other than control over fish landings in the State, there are no fish management regulations or practices which the State of Washington can unilaterally employ to effectively control fishing beyond its territorial waters. [Exs. F–32, p. 20, *l.* 9–13; F–28, p. 12, *l.* 19 to p. 13, *l.* 6]

187. Gill net fishing of the type and operation utilized by the Plaintiff tribes is not an inherently destructive means of harvesting salmonids (including steelhead), and it may be regulated and controlled sufficiently to prevent over-harvesting. [FPTO § 3–472; Ex. USA–36, p. 5, *l.* 18 to p. 6, *l.* 13] The amount of fish taken in nets may be regulated by regulation of net length, the type of the net, mesh size, the place of fishing and periods for taking. Net fisheries and hook-and-line fisheries can be regulated, from total prohibition to total permission, with all degrees of restrictions in between. [FPTO § 3–438]

188. From a biological standpoint one of the standards for determining the amount of fishing time to allow an Indian tribe is the anticipated impact of the tribe's fishery on the run. This is influenced by the number of fishermen and amount of gear that will participate. [Tr. 3840, *l.* 15 to 3841, *l.* 10.] It is estimated

by the Department of Fisheries that the following numbers of fishermen fish in the Indian, sport and commercial fisheries in the case area: Indian 794; sport 283,650; commercial 6,600. [Tr. 3645, *l.* 2 to 3649, *l.* 17]

189. Because Indian tribes sometimes sell their fish directly to out-of-state buyers, state catch records of Indian catch obtained from fish buyers in the State of Washington will not necessarily show the entire commercial catch taken by Indian fishermen. [Tr. 3478, *l.* 17 to 3479, *l.* 5; Tr. 3502, *l.* 19 to 3504, *l.* 2]

190. Historically, limitations on the Indians' catch were controlled by: 1) the needs of the relatively small human population; 2) the efficiency of the Indians' fishery as affected by natural phenomena; and, 3) tribal custom and religious commandments. More recently, individual Indian tribes have established written regulations controlling the taking of fish by their members. Others have practiced limitations without formal written regulations. [Ex. JX–2a, § 2.10.4, p. 97] From time to time each of the Plaintiff reservation tribes has enacted written fishing regulations. These regulations deal with the times, places and manner of fishing. Examples of current tribal regulations are included in Exhibit JX–2b. [FPTO § 3–651] Other examples are contained in Exhibits L–9 and QN–1. [Ex. JX–2a, § 2.10.4, p. 97; Tr. 2997, *l.* 2–15; Tr. 3487, *l.* 18–22]

191. Since 1967 the United States Bureau of Indian Affairs has issued identification cards, or approved the issuance of tribal identification cards, co-signed by an authorized Bureau official and tribal chairman, to persons who establish to the satisfaction of both the Bureau official and the tribe that they are members of a BIA-recognized Indian tribe which the Bureau recognizes as having off-reservation fishing rights pursuant to any of the treaties listed in Paragraph 1 above. [FPTO § 3–650; Exs. USA–46c, 46d, 46e, 46f, 46g, 47 and 48; Exs. PL–5 and 48; Ex. USA–54, p. 4, *l.* 18 to p. 9, *l.* 23] Regulations issued by the Secretary of the Interior and published in the Code of Federal Regulations (at 25 CFR Part 256)

require that such cards be carried, and be shown on demand to state, federal or tribal enforcement officers, by any Indian exercising treaty fishing rights outside of Indian reservations. The regulations provide that such cards will be prima-facie evidence that the authorized holder is entitled to exercise the treaty fishing rights specified thereon. In 1967 the Bureau of Indian Affairs notified state authorities, including the Department of Fisheries and the Department of Game, of the procedures concerning the issuance of such cards and has furnished them facsimiles of the BIA cards. The Bureau of Indian Affairs maintains lists of all persons to whom such BIA cards have been issued. Upon specific request from state authorities concerning the Indian status or tribal membership of specific individuals, the Bureau has advised state authorities of the information it has on such status. [Exs. USA–46c, 47, 48 and 54, p. 4, *l.* 18 to p. 9, *l.* 23; Tr 1585, *l.* 20 to 1586, *l.* 15; Tr. 1588, *l.* 1–14; Tr. 1601, *l.* 2–9]

192. Tribal fishing regulations are not technically reviewed for their content in terms of conservation goals prior to the time of or as a condition for their approval by the Bureau of Indian Affairs. However, the Bureau has asked the federal Bureau of Sport Fisheries and Wildlife to work with Bureau of Indian Affairs' staff and with the tribes in the review of tribal regulations before they become effective, so that there is some biological input. [Tr. 1607, *l.* 3 to 1611, *l.* 2]

193. Enforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians. [Tr. 2623, *l.* 6 to 2633, *l.* 22; Tr. 2694, *l.* 12–23; Tr. 2854, *l.* 24 to 2865, *l.* 6; Tr. 2876, *l.* 21 to 2878, *l.* 4; Tr. 3004, *l.* 25 to 3012, *l.* 8; Tr. 3014, *l.* 4–13; Tr. 3017, *l.* 9 to 3022, *l.* 3]

194. In dealing with fishing by members of the

Plaintiff tribes in a manner different from that expressly provided in their respective regulations, both the Game Department and Department of Fisheries have seized nets and other property of those members and have released, confiscated and attempted to prevent the sale and transportation of anadromous fish which are under their respective regulatory jurisdictions and which have been caught by those members. [FPTO §§ 3–5, 3–7]

195. Both the Fisheries and Game Departments have, on several occasions, disposed of or retained for unreasonably long periods of time (often extending over longer periods than one year) boats, nets, whether attended or unattended, or other property of members of the Plaintiff tribes and fish taken from the nets of such members. The tribal members have not been notified of the institution of any proceedings for, or acquisition of, judicial confiscations or forfeitures of said items by the State. [Tr. 604, *l.* 14 to 605, *l.* 18; Tr. 625, *l.* 4 to 627, *l.* 5; Tr. 2623, *l.* 6 to 2633, *l.* 22; Tr. 2657, *l.* 14 to 2659, *l.* 10; Tr. 2687, *l.* 12 to 2688, *l.* 16; Tr. 2876, *l.* 21 to 2878, *l.* 4; Tr. 3195, *l.* 17 to 3198, *l.* 16; Tr. 3204, *l.* 9 to 3205, *l.* 19]

196. (This Finding of Fact also may be, in part, a Conclusion of Law.) As applied to Plaintiff tribes and their members, the restrictions imposed by each of the following state statutes and regulations are broader than are necessary for the preservation of the fishery resource: RCW 75.08.260, RCW 75.12.060, RCW 75.12.070, RCW 75.12.160, RCW 77.08.020, RCW 77.12.100, RCW 77.12.130, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, RCW 77.16.060, WAC 220–20–010, WAC 220–20–015(2), and WAC 220–47–020.

197. The court has fully considered defendant Department of Fisheries' proposed Findings of Fact 111-115, 118-122, 125, 126, 129, 133 and 137, joined in by defendant Department of Game. These proposed Findings of Fact, which to some extent connote Conclusions of Law, generally reflect opinions, conclusions and judgments of Fisheries' officials regarding the requirements and procedures of an efficient management program for anadromous

fish. While most of these proposals appear to be reasonable, general policies or goals, in many instances their factual or legal validity cannot be determined in vacuo, but must await specific factual situations for application. On the present record, this court is not satisfied that these proposed Findings of Fact either are or are not established. Therefore, subject to the continuing jurisdiction retained in this case, the court reserves ruling on the above-specified proposed Findings of Fact at this time.

DEPARTMENT OF FISHERIES POLICIES AND PRACTICES

198. The Fisheries Department has broadly summarized its objectives as follows:

> "1. To conserve and, where possible, expand the primary fishery resources;
> "2. To promote optimum use of the fisheries resource by fishermen (commercial, sport, and Indian), the fishing industry, and general public;
> "3. To encourage harvesting of the sustainable yield of fish in a manner that provides the greatest return to the economy;
> "4. To develop public understanding of the fishery resource, its environment, and the philosophy governing exploitation of the resource, and to maintain public respect for the law."

The Department manages and regulates the harvest of the salmon resource for each of the three distinctive fisheries which it recognizes, i.e., commercial, sport and Indian. The differences in use objectives of these three fisheries dictate that separate management policies be applied to each. [Ex. JX-2a, § 2.5 pp. 67-68] Typically, the special treaty Indian fisheries are the last of the user groups to take from the run. [FPTO § 3-601]

199. In regulating the various salmon fisheries, the Department of Fisheries compiles and examines daily catch reorts, and compares those reports with reports in previous years. If the comparison and other indicia of run size should indicate that the particular run is larger than

the Department's predicted run size, the Department generally extends its seasons; if the comparison shows a smaller run, the department takes emergency action to restrict the length of its seasons. [FPTO § 3-580]

200. The Department of Fisheries begins planning its commercial salmon regulations in December preceding the season which opens the following summer. Regulation proposals are prepared in January and it is at that time that it is desirable to have information on the Indian fishery to be undertaken in the forthcoming season. [Tr. 1079, *l.* 7 to 1082, *l.* 18; Tr. 1088, *l.* 19 to 1089, *l.*2; Ex. F-5]

201. A principal method of limiting the commercial take from the salmon runs is limitation on the number of days when fishing is permitted. The Department attempts to provide that the number of days permitted is at the same point in a run, relative to its peaks and low points, such that, if the commercial fishermen in the North Sound are given their days during the time when the run is at its peak in those areas, the Indian fishermen in the rivers are being given their days during the run's peak in the rivers. [FPTO § 3-585] The Department of Fisheries feels it can regulate both commercial and sport fisheries to increase returns to Indian river fisheries to some extent. [Tr. 894, *l.* 24 to 895, *l.* 25] For example, the Department of Fisheries has closed East Pass at Vashon Island to commercial fishing. The result of this action has been to increase the salmon run available to treaty Indians in the Puyallup River by further restricting commercial fishing in the Sound. [FPTO §§ 3-583; 3-599]

202. It is the policy of the Department of Fisheries where there are mixed stocks of fish, one stock of which is in abundance, that it is sometimes in the interest of proper utilization of the total fishery resource to allow a harvest on the mixed stocks in order to prevent waste or overescapement of the abundant stock, even though this harvest may take some fish from a stock which has no harvestable surplus. In such case a value judgment must be made as to the proper regulatory balance to be stricken. [Tr. 863, *l.* 16 to 865, *l.* 16] Puget Sound, and the

Columbia River to the extent fish are bound for different tributaries, both have fisheries on mixed stocks. [Tr. 846, *l.* 23 to 847, *l.* 7]

203. Wastage of fish and potential harm to other species and to the spawning stock of the same species may occur as a result of overescapement of salmon at spawning grounds. The Department of Fisheries believes that it is not properly managing the salmon resource if fish in excess of the number needed for spawning escape to the spawning grounds. The Department has some capability to utilize the treaty Indian River net fisheries so as to harvest fish which would be surplus to spawning needs. It has utilized this capability in conjunction with the Muckleshoot, Nisqually and Skokomish Tribes. Weather and the physical conditions of the stream limit this capability. [FPTO § 3–605]

204. The Department of Fisheries has authority to impose limitations on the time, place and manner of sport and commercial fishing for salmon in the off-shore areas within the three-mile limit, the Strait of Juan de Fuca and Puget Sound which will effectively increase the size of salmon runs through the usual and accustomed fishing places of the Plaintiff tribes. [FPTO § 3–615]

205. The Department of Fisheries recently has been given power to authorize the moving of fishing gear to places where the Department wants to harvest surplus fish in the rivers and to limit the entry into the fishery so authorized. [FPTO § 3–611]

206. Within the last few years the Washington Department of Fisheries has authorized special limited gill net fisheries for chinook salmon and limited entry purse seine fisheries for coho salmon in marine waters of Carr Inlet, including the milling area off the mouth of Minter Creek, to crop surplus chinook and coho salmon returning to the Department's Minter Creek Hatchery. The extent of the surplus is influenced by limitations imposed on prior marine fisheries to assure adequate escapement to other South Sound streams and is evaluated when it appears at the Minter Creek mouth area. The authorized fishery is

then monitored daily to determine its proper duration. Participation in the Minter Creek purse seine fishery is determined by a drawing open to any licensed purse seiner who applies. The Department of Fisheries has neither requested any of the Plaintiff tribes to join in that fishery nor considered the question of whether unlicensed treaty Indians should be allowed to participate in the fishery. At least one of the Plaintiff tribes has members who operate in a marine fishery closer to Minter Creek than many of the non-Indian applicants for the drawing. [Tr. 839, *l.* 16 to 840, *l.* 13; Tr. 3780, *l.* 21 to 3787, *l.* 3; Ex. JX–2a, Table 31, pp. 192–193; JX–2a, App. II, Table 7, pp. 316–317; JX–2a, App. III, pp. 323, 328] Treaty Indian commercial net fisheries can be and have been authorized in areas which the State has designated as salmon preserves without jeopardizing conservation needs. [Tr. 837, *l.* 22 to 839, *l.* 15]

207. Although the Department of Fisheries believes that the approximately 239 smaller streams in the case area which collectively provide a significant part of the salmon production could not sustain an Indian commercial gill net fishery, it has not studied or considered whether it is necessary to prohibit an Indian spear, gaff, dip net, or hook and line subsistence or other fishery in those streams or an Indian net or troll fishery in their estuaries. [Tr. 3828, *l.* 5 to 3832, *l.* 23]

208. A management plan to meet obligations to provide to treaty Indians in the case area the treaty-secured right to take fish must include other treaty Indians who are not Plaintiffs in this case. [Tr. 3624, *l.* 4–15]

209. The Department of Fisheries takes the position that the treaty tribes hold a distinct treaty right to fish at usual and accustomed places outside their reservation, the quantum of which has never been adequately defined. [FPTO § 3–6] After the 1968 decision of the United States Supreme Court in Puyallup Tribe v. Department of Game, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689, the Department of Fisheries began to set special seasons for

various treaty tribes which provide for fishing for salmon by net at some off-reservation usual and accustomed fishing places. Some of the regulations permit Indian set gill nets on rivers, even though State statutes prohibiting use of such gear have not been changed. Fisheries attempts to set these seasons at times when there are significant numbers of fish in the Indian fisheries. [FPTO § 3-613; Ex. F-27, p. 3, *l.* 23-32] These regulations cover only seven of the treaty tribes in seven specific areas within the case area. [Ex. JX-2a, App. II, pp. 306-317] Indian net fishing which is confined geographically (similar to the limits provided by reservation boundaries on current on-reservation net fishing) may be regulated and controlled to prevent over-harvesting, assuming that some power of effective regulation exists to limit fishing as to time and amount of gear and enforce the limitation effectively. [FPTO § 3-472]

210. The Department of Fisheries has undertaken to augment the volume of fish available to treaty Indians fishing at the usual and accustomed places outside reservation boundaries by at least the following actions:

a) The Department considers the interest of the Indian fishery when formulating its regulations;

b) The Department attempts to determine how many Indians will fish, what their effort will be, and what the estimated take of the Indian fishery will be;

c) The Department has adjusted the number of days when the commercial fleet can fish;

d) The Department has closed certain areas to non-Indian fishing in the marine waters, such as in East Pass, and opened certain areas closed to commercial fishing to Indian commercial fishing, such as South Sound Preserve;

e) The Department has increased its planting efforts in those streams where Indian fisheries occur; and,

f) The Department has carried on stream improvement work. [FPTO § 3-599; Ex. JX-2a, § 2.2.5.1, pp. 55-56; Fig. 18, p. 254; App. II, Table 7, Squaxin Regulations, p. 316]

In some areas the Department of Fisheries' hatchery-reared plants of salmon have contributed significantly to Indian catches of salmon. [Ex. JX-2a, Table 29, pp. 181-187; Fig. 43, p. 279; Ex. F-19; Ex. F-28, p. 59, *l.* 31 to p. 60, *l.* 15; FPTO § 3-606]

211. The Department of Fisheries' hatchery system usually receives salmon in excess of its propagation needs. It is the Department's policy to provide numbers of these fish which are fit for human consumption to economically-depressed Indian people. Indian tribal representatives are contacted when these fish are available and it is their responsibility to see that these fish are distributed to the respective tribal members. In 1972, 256,194 pounds of salmon which had returned to the Department's hatcheries were provided to Indian people. [Ex. F-28, p. 39, *l.* 31 to p. 40, *l.* 11, p. 65, *l.* 17-27; Ex. F-20; Tr. 1095, *l.* 1 to 1096, *l.* 2]

212. For about the past decade, although there have been occasional disagreements about enforcement of Department regulations, the Department of Fisheries has in general had a cooperative relationship with several of the Plaintiff tribes. [Tr. 1006, *l.* 7-17; Tr. 2536, *l.* 20-24; Tr. 3014, *l.* 4-13; Tr. 3163, *l.* 3-7; Ex. F-33, p. 12, *l.* 23 to p. 13, *l.* 5; Ex. F-28, p. 60, *l.* 30 to p. 66, *l.* 11; Ex. F-24; Ex. F-25; FPTO §§ 3-603; 3-604] In addition to informal cooperation between the Department of Fisheries and Indian tribes, the Department has taken into account recommendations of Indian tribes through its administrative hearing process. [Tr. 991, *l.* 18 to 992, *l.* 5]

213. The Department of Fisheries' enforcement practices are governed by RCW 75.08. As described by the Chief of the Department's Fisheries Patrol, the enforcement policies and practices are to be applied equally to Indians and non-Indians without discrimination. [Ex. USA-37, p. 3, *l.* 24 to p. 4, *l.* 4] Unattended and unidentified fishing gear found fishing in violation of State law will be confiscated. The officer seizing the gear should make out a fact sheet regarding the incident, a description of the gear, and the disposition of the gear.

Then the gear is to be held in a warehouse in Seattle until sufficient quantities are on hand to make auction of it practicable. The gear then will be sold at auction after the required statutory notice has been given. The proceeds from the sale will go to the State general fund. [Ex. USA-37, p. 4, *l.* 5 to p. 5, *l.* 25] In the case of attended gear, a citation or arrest will be issued. The gear will be seized and held as evidence to be disposed of by the court. [Ex. USA-37, p. 6, *l.* 22 to p. 7, *l.* 17] If there are fish in the gear, the fish will be sold to the highest bid of a commercial fish buyer. The fish ticket is then to be held as evidence and if the person is later acquitted, the proceeds of the sale of the confiscated fish are to be turned over to him by court order. [Ex. USA-37, p. 14, *l.* 20 to p. 15, *l.* 14]

214. During certain times of the year the taking of pink and sockeye salmon from certain waters of the State of Washington and of British Columbia, Canada, is regulated in accordance with regulations prescribed by the International Pacific Salmon Fisheries Commission pursuant to treaties between the United States and Canada. The provisions of these regulations are approved by said International Commission and forwarded to the respective governments for adoption as domestic regulations. These regulations as they apply to waters of the State of Washington are usually promulgated and enforced by the Director of the Department of Fisheries as state regulations. However, under the applicable International treaties and statutes of the United States enacted pursuant thereto, the United States has both the authority and the obligation to enact the International Commission's recommendations as domestic federal regulation and directly enforce them if the State of Washington does not do so. The International Commission has no arrest or enforcement jurisdiction. While the Commission's jurisdiction is limited to protection of pink and sockeye salmon, its regulations which limit the types of gear which may be used or the times during which certain types of gear may be used in Convention waters have a coincidental effect on the taking of coho, chum and

chinook salmon which are present during the times that such regulations are in force. The waters to which such internationally prescribed regulations apply include some of the usual and accustomed fishing places of some of the treaty Indian tribes. [FPTO § 3-589; Ex. JX-2a, § 2.13, pp. 101-103; Ex. USA-19]

215. In regulating the American and Canadian net fisheries on pink and sockeye salmon bound for the Fraser River system, the International Pacific Salmon Fisheries Commission has attempted, pursuant to provisions of the applicable treaty, to provide an equal take to the Canadian and the American commercial fishermen in the Strait of Juan de Fuca, Northern Puget Sound and the Strait of Georgia; such that when it appears that, for example, the Canadians have taken significantly more fish than the Americans, the Commission will adjust its regulations to permit Americans to catch up. All harvesting on Fraser River stocks is intended to take only so much as will not damage the run. While some tributaries to the Fraser River have shown an underescapement as a result of the fishing efforts in the Straits and elsewhere, the regulation of Fraser River stocks by the International Commission is generally regarded by fisheries biologists as well managed. [FPTO § 3-590; Ex. JX-2a, § 2.13, p. 102]

216. Under guidelines established by the U.S. State Department at the instance of the Department of the Interior, the U.S. Commissioners on the International Pacific Salmon Fisheries Commission have sought recently in their activities on the Commission to protect the treaty fishing rights of one or more of the Plaintiff tribes. As a U.S. Commissioner on that Commission, the Director of the Fisheries Department has attempted unsuccessfully to obtain Canadian agreement to a greater number of fishing days for the Makah Indians on the Fraser River sockeye and pink salmon runs. The Director has taken unilateral action to provide more fishing days for the Makahs. [FPTO § 3-591]

217. The regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow

all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places to which the treaties apply. [See Ex. JX–2a, App. III]

218. The State and the Director of Fisheries have, by statute and regulation, totally closed a substantial number of the usual and accustomed fishing areas of Plaintiff tribes to all forms of net fishing while permitting commercial net fishing for salmon elsewhere on the same runs of fish. [See Ex. JX–2a, App. III]

DEPARTMENT OF GAME POLICIES AND PRACTICES

219. The stated purpose of the Game Department is: "To preserve, protect, perpetuate, and enhance wildlife through regulations and sound continuing programs to provide the maximum amount of wildlife-oriented recreation for the people of the State." [Ex. JX–2a, § 2.7, p. 89; Tr. 111, *l.* 12 to 114, *l.* 1] The Department and the Game Commission consider this their ultimate purpose in formulating policy, establishing regulations and managing the fish resources under their jurisdiction. [FPTO § 3–428] The state's steelhead fishery laws and regulations are designed to preserve the resource, provide orderly sport harvest and prevent commercialization of the steelhead. [FPTO §§ 3–430; 5–456; Ex. JX–2a, § 2.2.5.5, p. 59] The Game Department views its responsibilities as a state agency to be to protect and perpetuate the wildlife resources under its jurisdiction and where the species can be used consistently with such perpetuation, to use them for recreational enjoyment. [Tr. 112, *l.* 11–23] The Director believes it would be an abdication of his responsibilities to allow any off-reservation net fishing for steelhead by Indians except as may be ordered by a court. [Tr. 264, *l.* 10–22; Tr. 251, *l.* 4–10; Tr. 314, *l.* 5–13]

220. The Game Commission defines "conservation" as "wise or prudent use." In determining what is wise or prudent use of the fish resource, the Game Commission consults experts in the Game Department and the general public. [FPTO § 3–429]

221. The Director of the Game Department believes that an Indian net fishery for steelhead would be detrimental to the recreational fishery but not necessarily detrimental to the resource itself. [Tr. 288, *l.* 6 to 289, *l.* 8]

222. Prior to the United States Supreme Court decision in Department of Game v. Puyallup Tribe, (*Puyallup II*), 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973), when dealing with the claimed treaty fishing rights of Indian tribes, including the Plaintiff tribes, the Game Department took the position that, except for exemption from license fees when fishing in their ceded area, [FPTO §§ 3–478, 3–489; Ex. G–16, p. 4, *l.* 1–3] the Indian treaties do not grant to any Indian citizen or tribe any privileges or immunities greater than those which the Department recognized as being held by non-Indian citizens, [FPTO § 3–2] and that under the Constitutions and laws of the United States and of the State of Washington, the Department was required to regulate Indian fishing activities outside federal and Indian reservations to the same extent and in the same manner as it regulated fishing activity by all other classes of citizens. [FPTO § 3–3; Tr. 577, *l.* 2 to 588, *l.* 5] The Department had taken the position that state law prohibits it from considering recommendations in favor of Indian net fishing at off-reservation usual and accustomed places. [FPTO § 3–432] On the basis of that law, its own view of conservation, and its belief that as a matter of policy net fishing for Indian subsistence or economic need is not a wise or prudent use of the steelhead resource, [FPTO §§ 3–431, 3–432] the Department had refused to attempt to regulate fishing in waters subject to its jurisdiction so as to accord members of the Plaintiff tribes any opportunities to take, at their claimed off-reservation usual and accustomed fishing places, by any means other than angling, a fair and equitable portion of the anadromous fish runs that are subject to its regulatory jurisdiction, consistent with adequate escapement for spawning and reproduction. [FPTO § 3–4]

223. The policies and practices of the Game Department with respect to nets, boats and other gear which may be seized by its agents in the course of their law enforcement duties are:

a) When an unattended net is seized and the owner is not immediately identifiable, the net is marked and stored in Game Department facilities, but no specific written record is made of each seized net; the nets themselves and the written summaries constitute records of seized gear;

b) It is within the seizing officer's discretion whether to send the seized gear to Olympia or to keep it in the regional office where it was seized;

c) The only Game Department accounting of seized nets is a periodic check which results in a record of the number of nets which have been seized and the dates of seizure;

d) When there are only two or three fish seized with the gear, no record of the disposition of those fish is kept;

e) The Department has never asked a court to declare forfeiture of seized, unattended nets;

f) When the Department has seized boats or motors, they have been kept as evidence against an identified defendant;

g) Property is seized for the purpose of introduction as evidence in court;

h) If a person is acquitted of a charge, his gear is returned, but no restitution is made for fish which have been seized with the gear because the fish are rendered valueless due to the passage of time and the delay in court actions. They are disposed of to charitable or public institutions;

i) It is contrary to policy to seize a net which has not been seen engaged in illegal use. [FPTO § 3–479; Ex. USA–38, p. 4, *l.* 17–30]

224. Prior to February, 1972, a wildlife agent of the Game Department, acting in his official capacity and under color of state law, seized several unattended fishing gill nets from the Quillayute River and its tributaries. The State and the Game Department have been on notice since

at least February, 1972, that specifically identified members of the Quileute Tribe have asserted under oath that nets belonging to them, descriptions of some of which nets were given, were taken by unknown persons from specifically described locations on the Quillayute River at approximately the times which the wildlife agent says he seized the aforementioned nets. No judicial proceeding to declare a confiscation or forfeiture of these nets has been instituted nor have the nets been returned to the claimed owners thereof. [Tr. 625, *l.* 4 to 627, *l.* 5]

225. Prior to *Puyallup II*, the Game Department took the position that laws enacted by the state legislature need not be shown reasonable and necessary for conservation of the fishery in order to be binding on treaty Indians fishing at off-reservation usual and accustomed places, beyond the fact that said laws must have the same degree of reasonableness to apply to Indians as is constitutionally required to apply them to other citizens in the exercise of state police power. [FPTO § 3–485]

226. Prior to *Puyallup II*, the Game Department had never given consideration to the claimed treaty fishing rights of any of the Plaintiff tribes as an interest to be promoted in the Department's regulatory, management and propagation programs. [FPTO § 3–486] It had never considered permitting an off-reservation fishery for steelhead by Indians using any method other than angling, whether solely for Indian dietary consumption, for Indian cultural or ceremonial use, for sale or barter by the individual for his economic well-being, or for tribal economic development, processing, or sale of fish as a tribal enterprise. [FPTO § 3–487]

227. The Game Department has no idea where the Indians' usual and accustomed fishing places are and has never attempted to determine where they are. [Tr. 252, *l.* 21 to 254, *l.* 21] The recently retired Chief of Game's Wildlife Management Division testified as to his belief, and Game's policy, that every place in the State was a place where Indians commonly fished. [Tr. 620, *l.* 5–20]

228. At its meeting on October 2, 1972, the Game

Commission considered the question of whether to change its regulations so as to permit net fishing by any Indians at off-reservation usual and accustomed places under claim of treaty rights. The Game Department did not notify any of the Plaintiff tribes or the United Staes in advance that it would consider this question at that meeting. The Department did not file with the Washington Code Reviser, pursuant to RCW 34.04.025 and 34.04.010, a notice that it was going to consider the matters regarding Indian off-reservation net fishing which were listed on the agenda for, and were considered at, that meeting. In addition to legal advice from its attorney, the Commission considered only the facts and data presented by the Chief of its Fisheries Management Division, Mr. Clifford Millenbach. [FPTO §§ 3–440, 3–441]

229. Mr. Millenbach's preparation for the October 2, 1972, meeting was heavily predicated on his belief that the Department's consideration of an Indian net fishery was tied specifically to the Puyallup River rather than all rivers of the State. [Tr. 348, *l.* 5–12; Tr. 354, *l.* 3–8] Prior to his presentation Mr. Millenbach did not discuss the facts and data or recommendations he presented with any of the Plaintiff tribes and had not consulted with any of those tribes concerning their fishing practices or techniques. He had not estimated how many Indians would fish, how many fish would be in the coming run in the Puyallup River, or what specific level of escapement would be best for that run. He believed that the Commission was then considering a change in its regulations which at that time absolutely prohibited such fishing. [FPTO § 3–440]

230. Mr. Millenbach's October 2, 1972, recommendation to the Game Commission that it not allow an off-reservation Indian net fishery for steelhead was influenced heavily by his belief that state law prohibited him from recommending an authorization for such a fishery. [TR. 349, *l.* 5–10] The Commission, upon advice from its attorney, considered the facts and data presented by Mr. Millenbach as informative only, since the Commission believed that state law prohibited it from

passing a regulation which authorized off-reservation net fishing for steelhead by treaty Indians. [Tr. 1635, *l.* 12 to 1638, *l.* 13] In recommending that the Commission not authorize such net fishing by treaty Indians the Game Department, a) did not consider the ultimate use which such Indians would make of the fish taken; and, b) did not know how many Indians or nets would fish if such fishing were allowed, although its Director expected there would be many Indians fishing on many rivers. [FPTO § 3–440] The result of this consideration was the Commission's determination not to provide a regulation. The Game Commission asserted that this consideration and action by it constituted fulfillment of the following mandate of the Washington State Supreme Court in Department of Game v. Puyallup Tribe, 80 Wash.2d 561, 571, 497 P.2d 171, 178 (1972):

> "We hold that it is incumbent upon the Department of Game to provide, annually, regulations for a Puyallup Indian net fishery of steelhead when it is determined by the department, upon supporting facts and data, that an Indian net fishery would not be inconsistent with the necessary conservation of the steelhead fishery."[FPTO § 3–441]

231. The Game Department asserted that the Game Commission's action on October 2, 1972, concerning off-reservation Indian net fishing, was not an "order", "rule", or "regulation" as those terms are used in the Washington Administrative Procedure Act. RCW 34.04.025, RCW 34.04.010, RCW 77.12.040, RCW 77.12.050, or RCW 77.12.060. The Department describes the Commission's action as "an order of policy for conservation" and states:

> "What we were considering was whether an Indian net fishery would be inconsistent with the conservation of steelhead. We determined that Indian net fisheries, the establishment of Indian net fisheries would be inconsistent with conservation." [FPTO § 3–441]

The Director of the Game Department understands the result of the October 2, 1972, and August 20, 1973,

meetings of the Game Commission was a "closure" of Indian net fishing outside reservation boundaries. [Tr. 252, *l.* 7–20]

232. The facts and data submitted to the Game Commission at its meetings on October 2, 1972, and August 20, 1973, by the Game Department staff were inadequate to enable the Commission to determine whether or not an Indian net fishery on the Puyallup River or on any other river in the state would be inconsistent with the necessary conservation of the steelhead resource. [Tr. 349, *l.* 16 to 361, *l.* 3; Ex. PL–37; Ex. G–18]

233. The sportsmen's catch of winter steelhead on the Puyallup River for 1969-1970, the season immediately preceding the remand trial in Department of Game v. Puyallup Tribe, was an abnormally low 5,615 fish. [Ex. JX–2a, Table 62, p. 232; Ex. USA–3, p. 3] Although sportsmen's catches of winter steelhead on the Puyallup River the following year were 10,656, [Ex. JX–2a, Table 62, p. 232; Ex. USA–2, p. 2] the Director of the Game Department believes that the steelhead run has not, in any year since 1970, reached a magnitude that would justify the Commission's allowing any net fishery by treaty Indians on that river, even under his understanding of the Game Department's obligation under the Washington Supreme Court's May 4, 1972, decision in Department of Game v. Puyallup Tribe, 80 Wash.2d 561, 571, 497 P.2d 171 [Tr. 265, *l.* 11–20; Tr. 340, *l.* 8–14]

234. At its August 20, 1973, meeting to consider whether to allow an off-reservation net fishery for treaty Indians the Game Commission was informed by the Chief of the Game Department's Fishery Management Division, Mr. Millenbach, that the Puyallup River steelhead run is normally between 16,000–18,000 fish annually, that the sport catch is usually around 12,000–14,000 annually and that a spawning escapement of 25% to 50% is needed. The Commission was advised by its staff that because of this data the steelhead fishery "cannot withstand a commercial fishery on the Puyallup River." When one

Commissioner asked Mr. Millenbach if he felt the time would ever come when there would be sufficient steelhead for a net fishing season for the Puyallup Indians, the latter replied that it was the staff's view that the recreational fishery was then harvesting the resource and that this generally will hold true. They foresaw a regular yearly increase in sports fishermen. After receiving this data and recommendation the Commission refused to allow any Indian net fishery for steelhead. [Ex. G–18, pp. 4 and 10]

235. The Game Department has very limited data on the total number of fish in steelhead runs. It does not formally estimate or predict the sizes of future steelhead runs, but does make general comments on relative abundance. The large number of factors which influence eventual survival of steelhead currently make the capability of the Game Department to predict the size of steelhead runs extremely difficult. By examining the current water flow and planting records for the steelhead which will be returning in the coming year, and by examining spawning ground counts for the brood year (when available), the Department estimates whether the coming steelhead runs in named rivers will be greater or smaller than in prior years. [FPTO §§ 3–458, 3–459]

236. The Game Department would be able better to manage the steelhead resource if its facts and data were specific as to individual river systems, but budget limitations of the Game Department preclude the acquisition of this data at this time. [FPTO § 3–473] As its catch statistics and escapement data come to cover longer periods and become more accurate, Game will become better able reliably to protect the steelhead runs and to provide for a more efficient harvest of the resource. [FPTO § 3–433]

237. The Game Department has not determined whether steelhead spawners in excess of the amount a river system could sustain would be harmful to the run. [FPTO § 3–468] The Game Department is aware that planting of pre-smolt size steelhead may create an adverse

competition with natural stocks which would not otherwise occur with smolt size plants. [FPTO § 3–444]

238. Steelhead punch cards are used by the Game Department to compile catch data on the time and river in which the fish have been caught. The Department estimates annual steelhead catch by multiplying the catch reported on returned punch cards by a factor designed to compensate for unreturned cards. The Department requires treaty Indians to have a free steelhead punch card when angling outside reservation boundaries. [FPTO § 3–439]

239. There are considerable fluctuations in the percentages of steelhead runs taken by fishermen from year to year. The Department considers that a generally beneficial escapement percentage for steelhead is 25 to 50%. [FPTO §§ 3–464, 3–458]

240. The Game Department's steelhead planting program has grown from a relatively insignificant contribution in the 1940's to a significant contribution to steelhead fisheries since 1951. The Game Department in early 1973 was producing three million winter steelhead smolts and 1.5–2 million summer steelhead smolts in its hatchery program. The Department plants steelhead in approximately 60 rivers currently, these generally being the major rivers. Mr. Millenbach estimates generally a "five per cent return" from steelhead plants in Washington State rivers. Not all river systems sustaining natural steelhead runs are planted. Not all planted rivers have been subject to marking experiments. In determining where to plant steelhead and how much to plant, the Game Department considers the relative size of the river system, the punch card records of sports catch in previous years, the Department's capacity to produce steelhead smolts and the amenability of the river system to sport fishing. The capacity to produce smolts is considered as the most decisive factor. It is a general policy of the Game Department to plant at least 20,000 steelhead smolts in each planted river. This policy is a result of the Department's determination that such a volume of

planting is necessary to encourage a sufficient level of sport fishing to utilize the resulting augmented run. [FPTO § 3–445] In the opinion of the Game Department, its steelhead planting program can be used to reestablish decimated runs when other environmental conditions are adequate. [FPTO § 3–470]

241. The Game Department steelhead seasons vary from river system to river system, due to the fact that the spawning period begins earlier in the smaller systems and that steelhead runs in different systems vary in quantity and timing. The Department attempts to protect steelhead spawning areas throughout the river environment, although it does permit fishing in some river areas where steelhead spawn. The Department has set upstream deadlines, above which no one may fish, in order to provide an undisturbed area for spawning. There is no downstream deadline. The Game Department permits fishing for steelhead in all marine areas within its regulatory jurisdiction. Saltwater steelhead fisheries are insignificant. Most are located on Whidbey Island at Bush Point and Lagoon Point. [FPTO § 3–450]

242. The peak months of the winter steelhead run in Washington are December and January; the peak months for summer steelhead are July and August. [FPTO § 3–455]

243. The Game Department has no recorded statistics indicating whether fishing on spawning grounds by means of drift nets, drag nets, dip nets, set nets, gill nets, or purse seines will cause "prespawning mortality" as that term was used in State v. Moses, 79 Wash.2d 104, 117, 483 P.2d 832 (1971); but Game believes, based on observations, that such activities would cause prespawning mortality. [FPTO § 3–452]

244. From a conservation standpoint it makes no difference whether a fish is caught by sportsmen on a hook and line or by an Indian in a net. Assuming a regulated fishery in both instances it is possible to rebalance the numbers caught and maintain conservation. [Tr. 413, *l.* 1 to 416, *l.* 6; Tr. 448, *l.* 11–19]

245. Experience with the Fraser River fisheries demonstrates that with proper regulation of net fisheries salmon and steelhead resources can be preserved despite the existence of a gill net fishery with an asserted capability of 98% efficiency if unregulated. [Tr. 400, *l.* 18 to 407, *l.* 8.]

246. The steelhead resource has been preserved even with commercial net fisheries for steelhead on Indian reservations which are entirely unregulated by the State. [Tr. 256, *l.* 19 to 257, *l.* 8; Tr. 266, *l.* 15 to 267, *l.* 19; Tr. 427, *l.* 24 to 428, *l.* 10; FPTO § 3–466]

247. The Game Department has not undertaken any studies to determine the effect on steelhead of the Fisheries Department's recent special treaty Indian net fishing seasons for salmon. The Game Department is unaware of any studies which reliably conclude that an on-reservation Indian net fishery for steelhead which is unregulated by the State has caused a decrease in the steelhead run. [FPTO § 3–456]

248. The Game Department, pursuant to state law, has never considered permitting or authorizing any of the Plaintiff tribes to take part in the management or propagation of any anadromous fisheries under its regulatory jurisdiction. [FPTO § 3–437]

249. According to Game Department reports the statewide Indian catch, including the on-reservation catch, from the 1970-1971 winter steelhead run was less than 20% of the total catch. [Tr. 393, *l.* 13 to 394, *l.* 9]

250. As one basis for its conclusion that a hook and line fishery is the wisest use of the steelhead resource, the Game Department relies on a study which concluded that a steelhead fisherman contributes approximately $60.00 in general benefit to the economy of the State of Washington for each fish caught. [FPTO § 3–469; Ex. G–12]

251. There are presently about 145,000 licensed steelhead fishermen in the State of Washington. The present law and regulations authorize these fishermen to take 30 fish per man per season with sports gear. [Tr. 310, *l.* 3–13] The actual take totals approximately 250,000

steelhead per year. [Tr. 310, *l.* 24 to 311, *l.* 3; Exs. USA–2 through USA–11] Due to the nature of steelhead fishing, one could not maintain a family on a steelhead catch based on a hook and line fishery. [Tr. 4024, *l.* 5–14]

252. At the time of the treaties and for many years thereafter neither the Indians nor the non-Indian citizens treated steelhead any differently from salmon in terms of the purpose and means of their harvest. [Ex. USA–20, p. 6; Ex. USA–26, p. 62; Ex. PL–2, p. 164; Ex. JX–2a, §§ 2.3.1 and 2.3.2, pp. 61, 63]

253. The Game Department has received federal financial assistance in the amount of 50% under the Anadromous Fish Conservation Act, 16 U.S.C. §§ 757a–757f for construction and operation of its steelhead hatcheries. [FPTO § 3–442; Tr. 237, *l.* 8–16]

Based on the foregoing Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW

1. Jurisdiction is vested in this Court by virtue of:

a. 28 U.S.C. § 1345, in that the United States brings this action on its own behalf and on behalf of certain federally-recognized Indian tribes in connection with its administration of Indian affairs;

b. 28 U.S.C. § 1331, in that the matter in controversy involves the fishing rights of each of the Plaintiff tribes which in each case have a value in excess of $10,000, exclusive of interest and costs, and are claimed to exist and to be secured under the Constitution, laws and treaties of the United States.

c. 28 U.S.C. § 1343(3) and (4), in that the Plaintiff tribes allege that Defendant State of Washington, and its Department of Fisheries and Game have, under color of state law, regulation, custom and usage, deprived them of rights secured to them in the treaties cited in paragraph 1 and under the Constitution of the United States, and those tribes seek equitable relief for that deprivation.

d. 28 U.S.C. § 1362, as to the following Indian tribes each having a governing body duly recognized by the

Secretary of the Interior in that this action is brought by each on its own behalf alleging violations of its rights under the Constitution, laws and treaties of the United States: Hoh Tribe, Lummi Tribe, Makah Tribe, Muckleshoot Tribe, Quileute Tribe, Quinault tribe, Skokomish Tribe, Squaxin Island Tribe, Yakima Nation. [FPTO § 1]

2. Defendant Washington Reef Net Owners Association, an unincorporated association, is a proper party in accordance with Rule 24(b), Federal Rules of Civil Procedure, as the representatives of its members who are individuals engaging in such form of commercial fishing operations at various points in lower Puget Sound and in the San Juan Islands, claimed by the Plaintiff Lummi Tribe as among its usual and accustomed fishing places. [FPTO § 3–27]

3. Each of the Plaintiffs has standing to maintain the claims asserted in this action. [FPTO § 7]

4. An actual controversy exists between each of the Plaintiffs on the one hand and each of the Defendants on the other, as to the nature and extent of the claimed treaty fishing rights of the Plaintiff tribes and the attempted regulation thereof by the State Defendants, except that the controversy between the Defendant Reef Net Owners Association and the Plaintiffs is limited to the effect of the treaties on the reef net operations of members of the Association. [FPTO § 3]

5. Declaratory judgments are properly sought pursuant to 28 U.S.C. §§ 2201 and 2202 and this Court may grant such relief. [FPTO § 4]

6. Venue is properly laid in this Court under 28 U.S.C. § 1391(b) in that all Defendants reside within the Western District of Washington. [FPTO § 6]

7. This case is limited to the claimed treaty-secured off-reservation fishing rights of the Plaintiff tribes as they apply to areas of the Western District of Washington within the watersheds of Puget Sound and the Olympic Peninsula north of Grays Harbor, and in the adjacent offshore waters which are within the jurisdiction of the State of Washington. The subject matter of this case is

limited to the application of those rights to the anadromous fish which are in the waters described, including such fish as are native to other areas. [FPTO § 5]

8. Within the jurisdictional limits of the applicable statutes, and the subject matter described above, this case calls upon the Court to exercise the traditional equity powers entrusted to the Federal District Courts in declaring in clear and certain terms the special reserved nature of the treaty tribes' fishing rights and in fashioning just and appropriate relief which is comprehensive enough to protect the tribes' rights and to permit exercise of such of the State's police power as is necessary.

9. The recognition of a tribe as a treaty party or the political successor in interest to a treaty party is a federal political question on which state authorities and federal courts must follow the determination by the legislative or executive branch of the Federal Government.

10. Absent a contrary congressional determination, the recognition by the executive branch of the Federal Government, acting through the Secretary of the Interior and his delegatees as the official charged by federal statute with the administration of Indian affairs, of the Plaintiff Muckleshoot Tribe as a political successor in interest to tribes or bands which were parties to the Treaty of Point Elliott or the Treaty of Medicine Creek is binding upon the State of Washington and its agencies and officials.

11. By its enactment of legislation (P.L. 90–530, 82 Stat. 882) providing for the disposition of judgment funds awarded to the Muckleshoot Tribe, Plaintiff herein, by the Indian Claims Commission in Indian Claims Commission Docket No. 98, Congress has recognized that tribe as the successor in interest to Indians who were parties to the Treaty of Point Elliott and the Treaty of Medicine Creek.

12. By its enactment of legislation (P.L. 92–30, 85 Stat. 83) providing for the disposition of judgment funds awarded to the Upper Skagit Tribe, including the allied Suiattle-Sauk Band, by the Indian Claims Commission in Indian Claims Commission Docket No. 92, Congress has

recognized that that tribe and band were parties to the Treaty of Point Elliot and has directed the Secretary of the Interior to prepare current rolls of the present-day lineal descendants of members of that tribe and band.

13. By its enactment of legislation (P.L. 93-134 approved October 19, 1973) providing for the future disposition of other judgment awards awarded by the Indian Claims Commission, Congress has authorized the Secretary of the Interior to determine the persons and Indian entities who are the present-day successors in interest to tribes which the Indian Claims Commision has found ceded lands to the United States pursuant to Indian treaties. Under this legislation the Secretary of the Interior has the authority to determine the present-day representative of the Stillaguamish Tribe which was awarded a judgment in Indian Claims Commission Docket No. 207 for lands ceded pursuant to the Treaty of Point Elliott.

14. The Plaintiff Muckleshoot Tribe is one of the holders of the right of taking fish secured to Indians by the Treaty of Point Elliott and the Treaty of Medicine Creek and it may authorize its members to exercise the right within the limits elsewhere prescribed herein with respect to the scope of the right.

15. Upon approval of their respective membership rolls and structures of organization by the Secretary of the Interior, the Plaintiff Upper Skagit Tribe, Plaintiff Sauk-Suiattle Tribe and Plaintiff Stillaguamish Tribe are each a holder of the right of taking fish secured to Indians by the Treaty of Point Elliott and each may authorize its members to exercise the right within the limits elsewhere prescribed herein with respect to the scope of the right.

16. Each of the Plaintiff tribes holds a right under one or more of the treaties cited in paragraph 1 of the Findings of Fact herein to fish at usual and accustomed places outside of reservation boundaries.

17. Admission of the State of Washington into the Union upon an equal footing with the original states had no effect upon the treaty rights of the Plaintiff tribes. Such

admission imposed upon the State, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States.

18. Treaties with Indian tribes must be construed liberally in accordance with the meaning they were understood to have by the tribal representatives at the treaty council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

19. The treaty clauses regarding off-reservation fishing at usual and accustomed grounds and stations in common with other citizens secured to the Indians' rights, privileges and immunities distinct from those of other citizens.

20. The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times, and which exist in part to provide a volume of fish which is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.

21. The right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use, or the time or manner of taking, except to the extent necessary to achieve preservation of the resource and to allow non-Indians an opportunity to fish in common with treaty right fishermen outside reservation boundaries.

22. The passage of time and the changed conditions affecting the water courses and the fishery resources in the case area have not eroded and cannot erode the right secured by the treaties but have merely affected the limits which may be placed upon its exercise in order to preserve the fish resources which are necessary to the continued and future enjoyment of the right.

23. The State's police power to regulate the off-reservation fishing activities of members of the treaty tribes exists only to the extent necessary to protect the fishery resource. This power does not include the authority to impair or qualify the treaty right by limiting its exercise to State-preferred times, manners or purposes except as such limitation may be necessary for preservation of the resource and protection of the interests of all those entitled to share it. This power does not include the power to determine for the Indian tribes what is the wisest and best use of their share of the common resource.

24. The Stevens treaties do not prohibit or limit any specific manner, method or purpose of taking fish. The treaty tribes may utilize improvements in traditional fishing techniques, methods and gear subject only to restrictions necessary to preserve and maintain the resource.

25. The exercise of a treaty tribe's right to take anadromous fish is limited only by the geographical extent of the usual and accustomed fishing places, the limits of the harvestable stock, the tribe's fair need for fish, and the opportunity for non-Indians to fish in common with Indians outside reservation boundaries.

26. The only method providing a fair and comprehensive account of the usual and accustomed fishing places of the Plaintiff tribes is the the designation of the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons, on different runs. Changes in water course do not impair the geographical scope of the usual and accustomed fishing places. Although no complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled today, the areas identified in the Findings of Fact herein for each of the Plaintiff tribes in general describe some of the freshwater systems and marine areas within which the respective tribes fished at the time of the treaties and wherein those tribes, as determined above, are entitled to exercise their treaty fishing rights today.

27. Because the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the state.

28. The phrase "in common with" operates only to limit the exercise of the tribes' right to a share of the resource which will be consistent with preservation and maintenance of the resource and with the reasonable harvest by others of such fish as are not reasonably needed by the tribe, as set forth in the *Final Decision* of the court, pages 342–343.

29. Excepting tribes entitled to self-regulate fishing by their members (See *Final Decision*, pages 340–342), the right of a treaty tribe to take anadromous fish may be regulated by an appropriate exercise of state police power. To be appropriate, such regulation must:

a) Not discriminate against the treaty tribe's reserved right to fish.

b) Meet appropriate standards of substantive and procedural due process; and

c) Be shown by the State to be both reasonable and necessary to preserve and maintain the resource. When State laws or regulations affect the volume of anadromous fish available for harvest by a treaty tribe at usual and accustomed places, such regulations must be designed so as to carry out the purposes of the treaty provision securing to the tribe the right to take fish.

30. In order for a regulation to be reasonable and necessary for conservation, it must, when considered in the context of the total regulatory plan, be designed to preserve or maintain the resource.

31. To meet appropriate standards, regulations that affect the harvest by the tribes on future runs must receive a full, fair and public consideration and determination in accordance with the requirements of the Washington Administrative Procedures Act and regulations thereunder.

32. In order for regulations not to discriminate against treaty Indians, the Department of Fisheries' harvesting plan must provide for an opportunity for treaty Indians to take, at their off-reservation usual and accustomed fishing places, a share of the harvestable fish as set forth in the *Final Decision*, pages 342–343.

33. If any person shows identification (as set forth in the *Final Decision*, pages 341–342) to establish that he is exercising the fishing rights of a treaty tribe and if he is fishing in a usual and accustomed place, he is protected under federal law against any state action, unless the state has established that such action is an appropriate exercise of its police power.

34. The protection of the treaty rights of the Plaintiff tribes to take fish at their usual and accustomed places must be an objective of the State's regulatory policy co-equal with the preservation and propagation of fish runs for other users. Before it can restrict the treaty rights of the Plaintiff tribes to take fish at their usual and accustomed places, the State and its regulatory agencies must treat such treaty rights as an obligation and interest to be promoted in the State's regulatory, management and propagation programs.

35. In order to accord the treaty rights of the Plaintiff tribes and their members the appropriate protection required by paragraph 34 herein, the State and its regulatory agencies may not restrain the exercise of said rights by:

a) Use of a state statute or regulation of broad applicability instead of one specific as to time, place, species and gear; and

b) Prohibition of harvest by the tribes on future runs prior to a full, fair and public consideration and determination of specific need conducted in accordance with the requirements of the Washington Administrative Procedure Act and regulations thereunder.

36. The Plaintiff tribes having a federally-recognized tribal government have jurisdiction (in conformity with their tribal constitutions or other applicable tribal rules or

federal statutes) to enact and enforce regulations relating to the exercise outside reservation boundaries by their members of fishing rights secured to said tribes by treaty. However, the tribes cannot enlarge the right beyond that secured in the treaty.

37. Regulation of off-reservation Indian treaty fishing by the United States, the State, or the Plaintiff tribes does not preempt the regulation by any of the other two. Jurisdiction of each entity to regulate is unimpaired by the exercise of another entity's regulatory jurisdiction. With respect to matters over which there may be multiple jurisdiction, the extent of exercise or nonexercise of regulatory jurisdiction by the entity having primary interest in the matter may be relevant to the appropriateness of another entity's exercise of its jurisdiction. Also the exercise of federal or tribal regulatory control may affect the finding of "necessity" which is required for the validity of any state exercise of its police power to preserve the resource.

38. The application of current laws and regulations of the State to restrict the time, place, manner and volume of off-reservation harvest of anadromous fish by treaty tribes is unlawful for the reasons that, a) they have not been established to be necessary to preserve and maintain the resource; b) they operate to discriminate against the tribes' treaty right to fish; c) they have been adopted and enforced in violation of appropriate standards; and, d) they have been adopted and enforced in derogation of the meaning and purposes of the treaty provision at issue in this case.

39. The state laws and regulations pertaining to game fish which reserve the entire harvestable portion of a species of fish for a special interest and purpose discriminate illegally against the treaty Indians.

40. Regulations of the Director of Fisheries providing for special seasons and limitations applicable to the taking of fish by the members of certain treaty tribes do not fully protect the treaty fishing rights of the Plaintiff tribes in that they:

a) Do not apply to all of the usual and accustomed fishing places of said tribes;

b) Do not extend recognition of the treaty rights to all of the Plaintiff tribes;

c) Do not provide adequate opportunity for said tribes to take their proper share of the fish.

41. The following State statutes and regulations are specifically found not to meet the standards governing their applicability to the Indian exercise of treaty fishing rights and therefore may not lawfully be applied to restrict members of tribes having such rights from exercising those rights: RCW 75.08.260, RCW 75.12.060, RCW 75.12.070, RCW 75.12.160, RCW 77.08.020, RCW 77.12.100, RCW 77.12.130, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, RCW 77.16.060, WAC 220-20-010, WAC 220-20-015(2) and WAC 220-47-020.

42. In its consideration on October 2, 1972 and August 20, 1973, of whether an Indian net fishery would be inconsistent with the necessary conservation of the steelhead fishery, the Department of Game and the Game Commission did not accord the Puyallup Tribe or other treaty tribes a hearing in conformity with due process of law or the Washington Administrative Procedure Act, RCW Chapter 34.04, and applicable provisions of the Washington Administrative Code.

43. The seizure and damage, destruction, disposition or unreasonably long detention of fishing gear and other property of members of the Plaintiff tribes by the Defendants or their officers, employees, or agents without any judicial determination of confiscation or forfeiture is an unlawful deprivation of the rights of said members under the Fourteenth Amendment of the Constitution of the United States and the treaties listed in paragraph 1 of the Findings of Fact herein.

44. The continued retention of fishing gear and other property belonging to the members of the Plaintiff tribes and seized pursuant to the laws and regulations which are herein declared to be in conflict with the treaty rights of said tribes is unlawful and such property or its value must

be returned to its owner, if known; otherwise to the tribe whose reservation is nearest to the place of seizure.

45. The Lummi Tribe continues to hold treaty-secured rights to fish with reef net gear in its usual and accustomed places, including Legoe Bay off Lummi Island, which rights are distinct from, and have priority over, any privilege of use and occupation of such places by members of the Defendant Washington Reef Net Owners Association.

46. The Plaintiffs are unable to be a party to criminal cases brought for the violation of the state statutes and regulations challenged in this action and are without an adequate remedy at law or any remedy at law whatsoever fully to assert and adequately to enforce and protect the fishing rights reserved and secured to the Plaintiff tribes by the treaties involved in this case. The individual members of the Plaintiff tribes are without an adequate remedy at law to redress or prevent unlawful interference with their exercise of fishing rights reserved and secured by said treaties because: a) the treaty rights that are asserted are unique and the damages which have been or will be sustained are not susceptible of definite monetary determination; and, b) in the case of criminal prosecutions said members have no remedy at all except at the risk of suffering arrests, seizure of property, fines, imprisonment and confiscation of property involving a multiplicity of legal proceedings.

47. The Plaintiffs are entitled to injunctive relief against the continuation and repetition of acts or omissions declared by these Conclusions of Law to be in violation of the treaty-secured rights of the Plaintiff tribes and their members.

48. This Court should retain continuing jurisdiction of this case to grant such further relief as may be found by the court to be appropriate on motion of any party hereto and to assure compliance with the Judgment Decree entered herein.

DECLARATORY JUDGMENT AND DECREE

This judgment and decree is based upon the Findings of Fact, Agreed Facts, Conclusions of Law and Decision of the Court entered in this case, all of which by this reference are hereby made a part hereof as though set forth in full herein, and close and detailed consideration by the Court. No language herein shall be interpreted as superseding the Decision of the Court, which shall control if in any respect it appears to be in conflict with any Finding herein.

In order clearly to delineate the off-reservation fishing rights held by certain Indian entities in this district under treaties made with the United States, it is hereby

Ordered, adjudged and decreed that the right of each of the plaintiff tribes in this case to harvest anadromous fish in waters within the Western District of Washington, outside the boundaries of Indian reservations and areas of exclusive *federal jurisdiction*, is declared to be as follows:

A. *Definitions*

All definitions contained in the Glossary of Terms of the Joint Biological Statement (Exhibit JX–2a) are hereby incorporated by reference. In addition and specifically for the purposes of interpreting all provisions of this decree, the following definitions shall be controlling:

1. *Anadromous fish:* Any fish which spawns or is artificially produced in freshwater, reaches mature size while rearing in saltwater and returns to freshwater to reproduce, and which spends any portion of its life cycle in waters within the Western District of Washington.

2. *Adequate production escapement:* In an approximate number of anadromous fish, that level of escapement from each fishery which will produce viable offspring in numbers to fully utilize all natural spawning grounds and propagation facilities reasonable and necessary for conservation of the resource, as defined in the Decision of the court.

3. *Harvestable stock:* The approximate number of anadromous fish which is surplus beyond adequate

production escapement and Indian needs as defined in the Decision; that is, the number remaining when the adequate production escapement and Indian needs are subtracted from the run size.

4. *To preserve and maintain the resource:* Upon a full consideration of (a) the history of State anadromous fish management, (b) the level of catch within the Western District of Washington in recent years, (c) the quality of freshwater and artificial production environments, (d) the most recent facts and data concerning anadromous fish production potential, (e) the potential for interspecific competition, and (f) the prospects for improvement of anadromous fish production, to perpetuate the runs of anadromous fish at least at their current level.

5. *Run:* A group of anadromous fish on its return migration, identified by species, race and water of origin.

6. *State:* The State of Washington, its agents, officers, agencies, assigns and subdivisions.

7. *Stevens' treaties:* Those treaties identified in the Findings of Fact and Conclusions of Law as having been negotiated between Isaac I. Stevens, for the United States, and certain Indian tribes and bands who lived in Washington Territory during the 1850's.

8. *Treaty Tribe:* One of the Indian entities described in paragraph 10 below, or any other entity entitled to exercise treaty fishing rights under the treaties construed herein within the Western District of Washington.

9. *Usual and accustomed places:* Those areas in, on and around the freshwater and saltwater areas within the Western District of Washington, which were understood by the Indian parties to the Stevens' treaties to be embraced within the treaty terms "usual and accustomed" "grounds," "stations" and "places."

B. Treaty Fishing Rights

10. Each of the plaintiff tribes listed below is a Treaty Tribe. The list given below is a declaration only as to those 14 Indian entities which have been represented on the plaintiff side in this case. A Treaty Tribe occupies the

status of a party to one or more of the Stevens' treaties and therefore holds for the benefit of its members a reserved right to harvest anadromous fish at all usual and accustomed places outside reservation boundaries, in common with others:

Hoh Tribe of Indians;
Lummi Indian Tribe;
Makah Indian Tribe;
Muckleshoot Indian Tribe;
Nisqually Indian Community of the Nisqually Reservation;
Puyallup Tribe of the Puyallup Reservation;
Quileute Indian Tribe;
Quinault Tribe of Indians;
Sauk-Suiattle Indian Tribe;
Skokomish Indian Tribe;
Squaxin Island Tribe of Indians;
Stillaguamish Tribe of Indians;
Upper Skagit River Tribe;
Confederated Tribes and Bands of the Yakima Indian Nation

11. The right of a Treaty Tribe to harvest anadromous fish outside reservation boundaries arises from a provision which appears in each of the Stevens' treaties and which, with immaterial variations, states:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * * .

12. It is the responsibility of all citizens to see that the terms of the Stevens' treaties are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the councils, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

13. From the earliest known times, up to and beyond the time of the Stevens' treaties, the Indians comprising

each of the treating tribes and bands were primarily a fishing, hunting and gathering people dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture. They were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers. Anadromous fish was the great staple of their diet and livelihood. They cured and dried large quantities for year around use, both for themselves and for others through sale, trade, barter and employment. With the advent of canning technology in the latter half of the 19th Century the commercial exploitation of the anadromous fish resources by non-Indians increased tremendously. Indians, fishing under their treaty-secured rights, also participated in this expanded commercial fishery and sold many fish to non-Indian packers and dealers.

14. The taking of anadromous fish from usual and accustomed places, the right to which was secured to the Treaty Tribes in the Stevens' treaties, constituted both the means of economic livelihood and the foundation of native culture. Reservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaties. Settlement of the West and the rise of industrial America have significantly circumscribed the opportunities of members of the Treaty Tribes to fish for subsistence and commerce and to maintain tribal traditions. But the mere passage of time has not eroded, and cannot erode, the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold.

15. The treaty-secured rights to resort to the usual and accustomed places to fish were a part of larger rights possessed by the treating Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to their existence than the atmosphere they breathed. The treaty was not a grant of

rights to the treating Indians, but a grant of rights from them, and a reservation of those not granted. In the Stevens' treaties, such reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings betwen private individuals. The reservations were in large areas of territory, and the negotiations were with the tribes. The treaties reserved rights, however, to every individual Indian, as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved for exercise "in common with citizens of the Territory."

16. The Stevens' treaties do not reserve to the Treaty Tribes any specific manner, method or purpose of taking fish; nor do the treaties prohibit any specific manner, method or purpose. Just as non-Indians may continue to take advantage of improvements in fishing techniques, the Treaty Tribes may, in exercising their rights to take anadromous fish, utilize improvements in traditional fishing methods, such for example as nylon nets and steel hooks.

17. The exercise of a Treaty Tribe's right to take anadromous fish outside of reservation boundaries is limited only by geographical extent of the usual and accustomed places, the limits of the harvestable stock and the number of fish which non-treaty fishermen shall have an opportunity to catch, as provided in the Decision of the Court.

18. Because the right of each Treaty Tribe to take anadromous fish arises from a treaty with the United States, that right is preserved and protected under the supreme law of the land, does not depend on State law, is distinct from rights or privileges held by others, and may not be qualified by any action of the State.

19. The treaty phrase "in common with" does not secure any treaty right or privilege to anyone other than the Treaty Tribes, nor does that phrase qualify any Indian's treaty right to fish, except as provided in the Decision of the Court.

20. Except for tribes now or hereafter entitled to self-regulation of tribal fishing, as provided in the Decision of the Court, the right of a Treaty Tribe to take anadromous fish may be regulated by an appropriate exercise of State power. To be appropriate, such regulation must:

a. Not discriminate against the Treaty Tribe's reserved right to fish;

b. Meet appropriate standards of substantive and procedural due process; and

c. Be shown by the State to be both reasonable and necessary to preserve and maintain the resource. When State law or regulations affect the volume of anadromous fish available for harvest by a Treaty Tribe at usual and accustomed places, such regulations must be designed so as to carry out the purposes of the treaty provision securing to the Tribe the right to take fish.

21. If any person shows identification, as provided in the Decision of the Court, that he is exercising the fishing rights of a Treaty Tribe and if he is fishing in a usual and accustomed place, he is protected under federal law against any State action which affects the time, place, manner, purpose or volume of his harvest of anadromous fish, unless the State has previously established that such action is an appropriate exercise of its power.

22. The application of currently effective laws and regulations of the State of Washington specified in the Conclusions of Law which affect the time, place, manner and volume of off-reservation harvest of anadromous fish by Treaty Tribes is unlawful for the reasons also stated in the Conclusions of Law.

23. All Findings of Fact and Conclusions of Law pertinent to the nature, scope and effect of the fishing rights of the Treaty Tribes are specifically incorporated by reference herein.

24. The court retains jurisdiction of this case for the life of this decree to take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law and in implementation of this decree.

25. Appointment of a Master, technical experts and an Advisory Committee on Treaty Right Fishing will be considered and determined as provided in the Decision of the Court.

26. Plaintiffs' application for an injunction will be considered and determined upon hearing thereof at the earliest practicable date following entry of this judgment and decree.

RULINGS ON FISHERIES' QUESTIONS PER RECONSIDERATION MOTION

1. Is the state or its officers authorized to arrest a member of one of plaintiff tribes fishing in contravention of state law outside the area of his tribe's usual and accustomed fishing grounds, enumerated in this Court's Findings of Fact or as determined in a subsequent proceeding in this Court, even though such individual may prove, in his defense in any criminal proceeding resulting from his arrest, that such area in which he was fishing is a usual and accustomed fishing ground of his tribe?

A. Yes. In the hearings of March 5 and 6, 1974, the court directed each plaintiff tribe to determine and report to Fisheries and Game, in advance of a particular run or season, the names of tribal members who expect to fish in the period in question, the amount and type of gear to be used, and the usual and accustomed locations where such fishing will be conducted. After a reasonable time for compliance, any tribal member fishing in a location other than as reported by his tribe, is acting in violation of the orders and decision of this court. If such tribal member is also fishing in violation of state law, he or she is subject to state arrest and criminal prosecution; provided, that if the defendant proves he was fishing at a usual and accustomed ground or station of his tribe, although not previously designated as such, it shall be a defense to any such prosecution.

2. Can the state meet its burden of proving the necessity for a state regulation of an off-reservation Indian treaty fishery by showing that:

(a) The off-reservation catch, other than fish needed for personal food or ceremonies, of the tribe or tribes for which regulation is sought is in excess of 50% of the harvest taking place by all fishermen in the area of the tribe's or tribes' usual and accustomed fishing ground; and
(b) such regulation is necessary for conservation?

A. No. While the showing specified in the question might be sufficient on a particular run of fish in a particular stream or area, it would be necessary to further show how the particular take affected the total take of all treaty right fishermen at all usual and accustomed grounds and stations. The State must regulate non-Indian fishing in marine areas to assure, as far as possible, that an adequate number of harvestable fish reach the Indian fisheries.

3. What is the status of a tribe pending its compliance with the Court's requirements to identify and certify its fishermen and to provide the state with fish catch statistics?

A. During the period pending compliance with the identification and certification requirements regarding the fishermen and tribal catch statistics reports, each tribe shall provide its fishermen with such credentials as are reasonably practicable, and a tribe, if otherwise qualified, will be entitled to self-regulation status.

4. Is the state or its officers authorized to arrest a member of one of plaintiff tribes fishing in contravention of state law without identification as required by the Court's opinion, even though such individual may prove, in his defense in any criminal proceeding resulting from his arrest, that he is a member of one of the plaintiff tribes?

A. The answer to this question is similar to the answer to question No. 1 above. In its Final Decision #I, the court required each tribe to provide its members with proper identification. Failure of an individual tribal fisherman to have such identification on his person when fishing, or when going to or from a fishing site, will cause him to be subject to state authority.

5. In proving regulations to the Court or in establishing findings before a special master:

(a) What specific elements must the state show to satisfy the requirement that the state prove in advance that its regulations are necessary for conservation?

(b) What specific elements must a tribe show to satisfy the qualifications that its fishing regulations will not adversly affect conservation?

A. (a) Final Decision #I prescribes the applicable standards and elements required for the state to show a specific regulation is necessary for conservation. These include requirements that the state utilize run size predictions, valid escapement goals, the least restrictive regulation of tribal fishermen and that the state view the entire run as a divisible resource. Experience with actual proposed regulations may disclose other specific elements which must be shown in advance of enforcement of state regulations against treaty right fishermen.

(b) Tribes shall promptly prepare regulations and submit them to Fisheries and Game, who will examine the proposed regulations for alleged inadequacies. The parties will confer with a view toward agreement; failing that, proposed regulations will be reviewable by the court on application of either party.

6. If the state can show that it is necessary for conservation to restrict off-reservation treaty fishing on a threatened run of a species destined for one river, but that other runs of the same species destined for other rivers are abundant enough to permit harvesting by treaty and non-treaty fishermen in accordance with the opinion of the court, may the state restrict the treaty off-reservation fishery on the threatened run even though non-treaty fishermen fishing on mixed runs will incidentally impact the threatened run? (See F.F. 202)

A. The state would not necessarily be allowed to operate in the manner set forth in the question. Various other factors may be involved. The state must explore alternatives to fishing on mixed stocks, consistent with the goal of full harvest of the resource.

7. Do fish caught by a member of one of the plaintiff tribes in the all citizen fishery count toward the off-reservation 50% share of his tribe? (See F.F. 32)

A. Fish caught by a member of one of the treaty tribes while fishing in the all-citizen fishery, at a usual and accustomed fishing place of the tribe, will be included in the tribe's off reservation share of the harvest. If a tribal member fishes in the all-citizen fishery at a location which is not a usual and accustomed ground or station of his tribe, that individual's catch will not count toward the tribal off-reservation share.

8. If a plaintiff tribe meets the qualifications and conditions for self regulation, may the state adopt that tribe's off-reservation fishing regulations, or other regulations approved by the Court, and enforce the same, i.e., is there pre-emption or concurrent jurisdiction between the state and the tribe? (See C.L. #37)

A. As stated in Conclusion of Law No. 37, the state and treaty tribes have concurrent jurisdiction with regard to regulation of the fishery resource. If, however, the treaty tribe is self-regulating, the state has only limited jurisdiction with regard to such tribe. The state can adopt regulations of a self-regulating tribe, but only if state promulgation is consistent with requisite administrative procedures. Furthermore, before any particular state regulations can be enforced against any treaty right fisherman, the state must additionally satisfy the requirement of showing the specific regulation is reasonable and necessary for conservation. Upon satisfaction of these requirements, self-regulating tribes must adopt state regulations found reasonable and necessary for conservation, as directed in Condition (a) at page 32 of FD #I. Also the state has authority to monitor the fishing activities of self-regulated tribes and to report alleged violations of valid state regulations to tribal authorities and, if appropriate action is not taken by the tribe, to the court for determination.

9 and 10—There are no questions so numbered.

11. May the state adopt and enforce, as its own regulation the regulation of a plaintiff tribe, which has not qualified to be self-regulating, without independently proving to the Court that such regulations are necessary for conservation?

A. The answer to this question is similar to the answer to question 8 above, except that with respect to non self-regulating tribes, the state may enforce properly promulgated regulations which have been established to be reasonable and necessary for conservation.

12. Where two or more Indian tribes have treaty rights to fish in the same off-reservation area, how is the off-reservation 50% treaty share to be calculated?

A. The division among tribes of the Indian off-reservation share of the harvest shall be determined by the tribes fishing in the same usual and accustomed places. The only concern of the state would be to determine (a) whether the total harvest by all tribes exceeds 50%, and (b) whether any tribe or group of tribes will cut into escapement when fishing as the tribes had planned.

13. Where two or more Indian tribes have treaty rights to fish in the same off-reservation area and the state, being unable to prove in advance the necessity of its regulations for conservation, adopts the regulations of one of the treaty tribes entitled to fish there, may the state enforce its regulation as to all treaty fishermen entitled to fish there?

A. State enforcement of fishing regulations adopted from either self-regulating or non self-regulating tribes is covered by the answers to questions 8 and 11 above.

14. Does a plaintiff tribe, which qualifies as a self-regulating tribe, have authority to enforce its off-reservation fishing regulations against persons who are not members of such tribe?

A. No. A self-regulating tribe has authority only over its own members. However, the tribes should report apparent misuse of the fishery to the state if a non-Indian is involved or to the tribe of a treaty right fisherman, and if appropriate action is not taken, such report should be

brought to the court for such action as the court finds appropriate.

15. If a tribe does not qualify as a self-regulating tribe and the state is unable to prove in advance the necessity of its regulations for conservation, does it necessarily follow that treaty fishing in the tribe's off-reservation usual and accustomed fishing area must be unregulated?

A. If a member of a non self-regulating tribe is alleged to be guilty of misuse of the fishery, such incident shall be reported to his tribe for adjudication, and failing prompt and appropriate action there, the matter should be brought to court for such action as the court finds appropriate.

16. How does the "alternative means" requirement in paragraph number 6 on page 36 of the Court's Opinion relate to the percentage share plan for off-reservation fisheries in paragraph 7 on pages 36–37 of the same?

A. The precise answer to this question is difficult because paragraph 6 on page 36 has been taken out of context and contrasted with the "sharing equally" concept. Taken together, in context, this language means that the state may not allow an overharvest by non-treaty fishermen, and then justify restriction of treaty right fishing by the requirements for spawning escapement necessary for conservation. Because of the locations of their usual and accustomed fishing places, treaty Indians are usually the last user group to harvest the resource. Because also the number of non-treaty right fishermen greatly exceeds the number of treaty right fishermen, the state must generally regulate the harvest by non-treaty right fishermen in order to assure, insofar as possible, that an adequate number of fish reach usual and accustomed fishing grounds to provide both the Indian tribal share of the harvest and the necessary spawning escapement.

17. For the purpose of exercising treaty fishing rights, may an Indian only be enrolled in one tribe?

A. Yes. The practicalities of regulatory enforcement require that any treaty right Indian, eligible for enrollment

in more than one tribe, may be certified and identified for fishing purposes by only one tribe.

18. Does the 1937 Convention between the United State and Canada (50 Stat. 1355), which establishes the International Pacific Salmon Fisheries Commission with jurisdiction to regulate the harvest of pink and sockeye salmon in the Strait of Juan de Fuca and northern Puget Sound, modify the Stevens treaties, so that plaintiff tribes which have usual and accustomed fishing grounds within the convention waters must fish in conformity with the regulations promulgated by the Commision and enforced, pursuant to 16 U.S.C. § 766d, by the State of Washington? (See F.F. 214)

A. In the opinion of this court, the 1937 convention does not explicitly or implicitly modify the Stevens' treaties. However, this court believes that treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission must comply with regulations of the Commission.

19. Are salmon runs, e.g., Deschutes River and Minter Creek, which are entirely artificially propagated, as distinguished from wild salmon runs which are artificially augmented, excluded from any calculation of the treaty fishermen's off-reservation 50% share as defined in the Court's opinion?

A. No. However, this ruling is subject to further consideration of the artificial propagation issue during pretrial and trial of the environmental issues.

20. Can a person who is not an enrolled member of a particular treaty tribe exercise, or assist in the exercise of, the treaty fishing right of, or on behalf of, a member of such tribe?

A. A treaty right fisherman may secure the assistance of other tribal fishermen with off-reservation treaty fishing rights in the same usual and accustomed places, whether or not such fishermen are members of the same tribe or another treaty tribe. A treaty right fisherman may also be assisted by his or her spouse (whether or not possessing individual treaty rights), forebears, children, grandchildren and siblings.

PROPOSED AMENDMENTS AND RULINGS THEREON

21. The Court's Opinion, Judgment and Decree be amended to require that the identification cards issued by the tribes, as required in the Court's Opinion, contain thereon the holder's tribal enrollment number.

A. There being no objection by plaintiffs, the amendment is adopted.

22. The Court's Opinion, Judgment and Decree be amended to require unattended gear to be marked by an identification tag issued by the tribe, as is required by the Yakima Tribe. (See F.F. 159)

A. The principle that unattended gear be marked by an identification tag is adopted; however, the specific type of tag to be used will be later determined by the court unless the parties can agree thereon.

23. Finding of Fact No. 101 be amended to include: Hatchery returns of fall chinook salmon to the Department of Fisheries Puyallup Hatchery were 22 fish as of the week of September 15, 1973. At a corresponding time in 1972, there was a return of 115 fall chinook salmon. The projected return of Puyallup River fall chinook salmon to the Puyallup Hatchery for the 1973 run was 132 fish, which compares with the previous all time low of 241 fish during a twenty year period commencing in 1953. (Tr. 4213, *l.* 21 to 4214 *l.* 23)

A. Denied. The data specified in the first two sentences are correct, but incomplete and out of context and therefore misleading. The first figure in the last sentence is a speculative estimate rather than established fact and therefore contrast to an actual prior year figure is also misleading.

24. Finding of Fact No. 96 and Conclusion of Law No. 41 be amended to delete RCW 75.08.260 from the list of specific statutes and regulations declared to be unlawful [Note: This statute makes violation of fishery statutes and regulations a gross misdemeanor. If it cannot be applied to treaty fishermen in instances where fishery regulations have received prior approval by the Court, Fisheries is

without any enforcement of its valid regulations. Fisheries has no authority of its own to make violation of its regulations unlawful. That power rests with the legislature.]

A. Denied, subject to modification as set forth in paragraph 6 of the injunction entered March 22, 1974.

25. Findings of Fact Nos. 153 and 158 be amended to delete references to the fact therein stated that the Yakimas sold commercially fish taken by them in the case area, and to add the following:

At the time of the treaties the Indians of the Yakima Tribe used fisheries located in the Puget Sound area for the purpose of obtaining salmon and steelhead for their subsistence and trade with other Indians. [Tr. 3299, *l.* 4–7; Ex. F–35, p. 11, *l.* 15–19, p. 13, *l.* 3–7; Ex. Y–13, p. 9, *l.* 8–14].

A. After consideration in context of FD #I and the record, denied.

26. Conclusions of Law be amended to add the following Conclusion:

The Yakima Tribe's treaty right to fish within the case area is subject to the consent of other treaty tribes in whose usual and accustomed fishing places the Yakima Tribe also fished at treaty times. (See F.F. 153)

A. After consideration in context of FD#I and the record, denied.

27. The Court's Opinion, Judgment and Decree be amended to indicate that the Quinault and Yakima Tribes do not meet Condition (a) [tribal off-reservation fishing regulations] of the Qualifications and Conditions established by the Court in its opinion to enable these tribes to be self-regulating, and, therefore, said tribes may not self-regulate their members' off-reservation fishing until such time as all the conditions established by the Court are met. [See F.F. 124 and 159].

A. Denied as to the Quinault Tribe; the required regulation was filed with the Court March 18, 1974. Denied as to the Yakima Nation, effective when that tribe adopts a regulation comparable to that filed by the Quinault Tribe.

28. The Court's Opinion, Judgment and Decree be amended to provide a method for the state to enact emergency regulations necessary for conservation. [See F.F. 199]. Such provision should recognize the provisions of the Washington Administrative Procedures Act for enactment of emergency regulations and provide a prompt method for judicial review, specifying the requisite notice and hearing requirements. Such procedure should enable the state to act within a twenty-four hour period.

A. Denied, except as the subject is now covered by paragraph 19 of the Injunction entered March 22, 1974.

INJUNCTION

Plaintiffs have moved the court for an injunction against defendants. The court has already determined that plaintiffs are entitled to injunctive relief against the continuation and repetition of acts and omissions which are in violation of the treaty-secured rights of the plaintiff tribes and their members. Defendants and plaintiffs have all submitted motions, memoranda, and have made oral argument to the court concerning general and specific questions and problems which will or may arise as the court's Final Decision #I is implemented. The court is of the firm opinion that the decision must be implemented as rapidly and as orderly as is practicable and consistent with conservation and protection of the anadromous fish resource, the rights of the Indian tribes, and the lawful exercise of state police power. In order to facilitate that implementation, it is necessary and desirable to define with specificity the obligations of the parties under the decision, making allowance for special practical problems and circumstances which a court of equity must heed.

Of utmost and immediate importance for protection of the fishery resource is the fashioning of an interim program for the lawful exercise of state police power over persons within state jurisdiction. The facts before this court indicate no reason for delaying an implementation of the rights of the plaintiff tribes to take fish as guaranteed to them in their treaties with the federal government, and

assuring an equitable apportionment of the state's fish harvest between treaty Indian and non-treaty fishermen. By adopting a flexible interim program, these goals all can be met. The court recognizes, of course, that such an incipient program must be flexible enough to accommodate the needs of all parties and the practical realities which exist as a new approach to fisheries management is effectuated.

The parties have raised a number of issues and questions concerning details and timing of the decision's implementation. Many such inquiries can be answered only as situations arise. Others are answered by defining the obligations of the parties in this injunction. The court has already appointed a special master to assist it in resolving future matters which arise under the decision and in implementing it.

Without attempting to anticipate each and every problem or question which may arise, the basic obligations of the parties, together with means for resolving future matters, can be set forth to guide the conduct of all parties, plaintiff and defendant. Accordingly, the court recognizes that successful performance of many duties imposed upon defendants by this injunction will depend upon plaintiffs' cooperation, good faith efforts, and compliance with requirements set forth in Final Decision # I.

It is not intended that anything in this injunction shall be construed to limit or qualify in any manner Final Decision # I or the right of the parties as set forth in that decision. All terms used in this injunction shall have the meanings set out in Final Decision # I. As used herein, the term "Final Decision # I" means the final Decision in this cause entered on February 12, 1974, as modified by the Orders entered March 22, 1974, including the Findings of Fact, Conclusions of Law and Decree entered February 12, 1974 which were made a part of said Final Decision # I.

Therefore it is hereby

Ordered, adjudged and decreed that the State of Washington; Thor C. Tollefson, Director, Washington

State Department of Fisheries; Carl Crouse, Director, Washington Department of Game; The Washington State Game Commission; the Washington Reef Net Owners Association, their agents, officers, employees, successors in interest; and all persons acting in concert or participation with any of them ("defendants") are permanently enjoined and restrained to obey, to respect and to comply with all rulings of this court in its Final Decision # I and with each provision of this injunction, subject only to such modifications as may be approved as a part of an interim program.

1. Defendants shall:

a. fully and fairly recognize each of the plaintiff tribes as a tribe holding all rights described and declared as to it in Final Decision # I and accord to each the tribal rights and powers recognized as to it in that decision;

b. fully observe and to the best of their ability carry out the provisions and purposes of the treaties cited in paragraph 1 of the Findings of Fact;

c. conform their regulatory action and enforcement to each and all of the standards set forth in Final Decision # I;

d. recognize the fishing rights in the case area of any treaty tribe not a party to this case to the full extent declared in Final Decision # I as to the plaintiff tribes and perform all acts and duties set forth in this injunction with respect to such additional treaty tribe upon the agreement of defendants or determination by the court that the tribe is a treaty tribe.

2. Defendants shall not interfere with or regulate or attempt to regulate the treaty right fishing of members of the Yakima Indian Nation or Quinault Tribe or any other treaty tribe during any period for which said tribe has been or is hereafter determined pursuant to Final Decision # I to be entitled to self-regulate such fishing by its

members without any state regulation thereof; provided however that monitoring by the state as stated as a condition for self-regulation may be exercised by the state and in case of a threat to the resource, the defendants may apply to the court for the exercise of regulatory authority;

3. Defendants shall not interfere with or regulate or attempt to regulate the treaty right fishing of members of any treaty tribe during any period not covered by paragraph 2 above as to such tribe unless the state first shows to the satisfaction of such tribe or this court that such regulation conforms to the requirements of Final Decision # I and this injunction.

Provided that notwithstanding any other provisions hereof the state may adopt and enforce provisions contained in a duly enacted off-reservation fishing regulation of any tribe when:

a. the tribe or tribes affected or this court determines that state assistance in the enforcement of such provisions is necessary for conservation; or

b. the tribe has entered into an agreement under which the state may apply the provisions contained in such tribal regulation against the persons exercising the treaty fishing rights of such tribe.

4. Except as otherwise provided in this injunction, defendants shall not enforce any state statute or regulation not conforming to the above against any individual fishing at his tribe's usual and accustomed fishing place who identifies himself by a tribal membership certification carried on his person. Any person exercising a treaty fishing right must have his identification as specified in paragraph 5 of this injunction on his person or risk lawful arrest by defendants, although it may later be determined or asserted as a successful defense in a criminal prosecution that such person was exercising a federally protected Indian treaty right to fish.

5. Identification sufficient to require application of paragraph 4 above shall be:

a. until June 1, 1974, for plaintiff tribes other than the Sauk-Suiattle, Upper Skagit and Stillaguamish Tribes, any identification which has been issued or authorized pursuant to the provisions of 25 C.F.R. § 256.3;

b. for any of the Sauk-Suiattle, Upper Skagit or Stillaguamish Tribes until the membership roll and organizational structure of said tribe is approved by the Secretary of the Interior or his delegate, but not beyond one year from the date of this injunction, any identification card signed by the tribe's tribal chairman certifying the person's membership in the tribe; and

c. in all the cases after the dates specified in a and b above, only identification which includes the name, tribal affiliation, enrollment number (where applicable), and a photograph of the holder and is certified by an authorized representative of the tribe or the Bureau of Indian Affairs.

6. Except as otherwise provided in this injunction, defendants shall not apply or enforce any of the following statutes or regulations to regulate, limit or restrict the exercise of the fishing rights of a treaty tribe as declared in Final Decision # I: RCW 75.08.260, RCW 75.12.060, RCW 75.12.070, RCW 75.12.160, RCW 77.08.020, RCW 77.12.100, RCW 77.12.130, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, RCW 77.16.060, WAC 220-20-010, WAC 220-015(2), WAC 220-47-020. Defendants may apply RCW 75.08.260 and RCW 77.16.240 with respect to those statutes and regulations which meet the requirements of paragraph 3 of this injunction.

7. In order for this court to determine that a state statute or regulation is reasonable and necessary for conservation, defendants must demonstrate that:

a. the specific statute or regulation is required to prevent demonstrable harm to the actual conservation of fish, i.e., it is essential to the perpetuation of a particular run or species of fish;

b. the measure is appropriate to its purpose;

c. existing tribal regulation or enforcement is inadequate to prevent demonstrable harm to the actual conservation of fish;

d. the conservation required cannot be achieved to the full extent necessary, consistent with the principle of equal sharing between treaty and non-treaty fishermen expressed in paragraph 14 of this injunction, by restriction of fishing by non-treaty fishermen or by other less restrictive alternative means or methods.

8. The court finds that the state has the responsibility for conserving the resources and accordingly, the state defendants shall diligently and vigorously, as far as circumstances permit, enforce their applicable statutes and regulations in order to safeguard the fish resources in the state from depletion or destruction due to unlawful fishing by persons subject to the state's jurisdiction.

9. The state defendants shall begin immediately, and shall continue expeditiously, to revise and to reorganize their regulatory action and enforcement so as to conform the same to all requirements of Final Decision # I and this injunction.

10. The state defendants shall publish any state treaty right fishing regulations which may be adopted after being shown to be in conformity with the requirements of Final Decision # I and this injunction, separate and apart from other state fishing regulations or as a separate and plainly labeled part thereof readily distinguishable from other fishing regulations.

11. The state defendants shall not adopt regulations or enforce any statutes or regulations affecting the volume of anadromous fish available for harvest by a treaty tribe at usual and accustomed places unless such regulations are designed so as to carry out the purposes of the treaty provisions securing to the tribe the right to take fish.

12. Except as otherwise provided by paragraph 19 hereof, the state defendants shall not adopt or enforce any regulations that affect the harvest by the tribe on future runs unless there first has been a full, fair and public consideration and determination in accordance with the requirements of the Washington Administrative Procedures Act and regulations under it.

13. The state defendants shall not regulate or restrain the exercise of treaty fishing rights of plaintiff tribes and their members by use of a state statute or regulation of broad applicability instead of one specific as to time, place, species and gear.

14. The state defendants shall not adopt or enforce any regulation which effectively limits the harvest by treaty tribes on future runs unless the state's regulatory scheme provides an opportunity for treaty tribes and their members to take, at their off-reservation usual and accustomed fishing places, by reasonable means feasible to them, an equal share of the harvestable number of each species of fish that may be taken by all fishermen; *provided* that for the present time defendants shall not be required to achieve mathematical precision in so allocating the fish;

Provided further that in order to approach more nearly the principle of equal sharing, the fish which Indian treaty fishermen shall have an opportunity to catch shall include not only an equal share of the total number of fish of any species which are within the regulatory jurisdiction of the State of Washington but shall also include an additional amount or quantity of fish which shall be determined by agreement of the parties or by approval of this court, to reflect the substantially disproportionate numbers of fish, many of which might otherwise be available for harvest by Indian treaty right fishermen, cuaght by non-treaty fishermen in marine areas closely adjacent to, but beyond the territorial waters of the state, or outside the jurisdiction of the state although within Washington waters;

And provided further that additional adjustments to permit the opportunity for treaty or non-treaty fishermen to harvest more or less than an equal share of any species of fish in the same or a subsequent year may be made by agreement of the parties, or by application by any party to the court for its direction or approval to compensate or allow for:

a. unexpected conditions or circumstances;

b. run size predictions, which, in spite of defendants' best efforts to achieve accuracy, were incorrect;

c. emergency regulations adopted in accordance with the provisions of this injunction;

d. historical fisheries of particular importance to Indians;

e. alteration or destruction of usual and accustomed fishing places, or environmental conditions, which limit the present day opportunity of treaty fishermen to take fish at such places;

f. measures shown by the state to be reasonable and necessary to assure as nearly as possible that there is a full a harvest as possible consistent with Final Decision #I.

15. Where the fish allocated to Indian treaty fishermen must be divided among two or more tribes having usual and accustomed fishing places through which the fish will pass, responsibility for such division shall rest with the tribes involved.

16. The state defendants shall immediately and expeditiously, consistent with availability of funds, begin to gather data and otherwise increase their technical capability to make run size predictions, establish escapement goals, and otherwise to increase their ability to manage the fisheries under their jurisdiction and control in a manner fully consistent with Final Decision #I.

17. The state defendants shall, as soon as practicable in advance of every fishing season, determine on the basis of the most current and reliable information available to them from their own technical staffs, other sources such as the treaty tribes and the United States Fish and Wildlife service, as accurately as possible the number of harvestable fish that may be taken during a particular fishing period which amount or quantity shall exclude such fish as are required for adequate production escapement and the estimated number of fish which will be needed by the tribes for traditional tribal ceremonies and personal subsistence consumption by tribal members and their immediate families. In carrying out this duty defendants

may request treaty tribes to submit to the Departments of Fisheries or Game reasonably accurate estimates of (1) the type, location and amount of fishing gear expected to be used and anticipated time for its use; (2) the number or quantity of fish they intend and expect to take at their usual and accustomed fishing grounds for traditional ceremonial needs and for consumption by tribal members and their families; (3) the number or quantity of fish they intend and expect to take on their reservations; and (4) reports of catches of fish by tribal members as to both on and off-reservation treaty fishery for the purpose of establishing escapement goals and other purposes which are reasonable and necessary conservation purposes.

18. The state defendants shall make available to a treaty tribe upon its request at the earliest practical time, such raw or processed data as they have available from time to time relative to the expected size, timing and condition of fish runs in the case area and the current level of harvest and escapement.

19. In order to accommodate unforeseen circumstances as readily as possible, consistent with conservation necessity, defendants may utilize procedures for making emergency regulations affecting taking of fish under this jurisdiction and control; *provided* that they shall adhere in every respect to the requirements of the Washington State Administrative Procedures Act and the regulations under it, and that the approval of such emergency regulations by this court where otherwise required by Final Decision #I and this injunction or the consent of all affected tribes has been obtained; *provided*, however, that emergency regulations are enforceable by the state upon filing with the court and service upon the tribes affected (or their counsel of record, if any) a copy of such regulations and a statement of facts and circumstances of the emergency on which the regulation is based. Any such tribe may respond and seek immediate court review. Requests for emergency consideration by this court will be given priority and determined speedily.

20. Plaintiffs and defendants shall submit, either

jointly or separately, on or before July 15, 1974, for the court's approval, a program to implement the interim plan for state regulation to be effective until defendants have an opportunity to implement fully all aspects of Final Decision #I, but no longer than one year from the date of submission or any extensions granted by leave of this court for good cause, and such regulations shall be, to the extent possible and practicable, consistent with the spirit of Final Decision #I, provided that all parties will be expected to adopt a flexible, reasonable approach in recognition of the special problems of defendants in implementing a new regulatory scheme and the fact that many of the tribes are only beginning to develop and exercise their full regulatory capabilities. Accordingly, the court will not expect or insist upon absolute compliance with the letter of Final Decision #I in reviewing and approving the interim plan.

21. Defendants shall in no manner limit, restrict or inhibit the time, place, manner, volume or purpose of the disposition by a member of a plaintiff tribe of fish harvested according to his rights and the rights and powers of his tribe, as declared and adjudged in Final Decision #I, or interfere with any person purchasing, attempting to purchase, transporting, receiving for shipment, processing or reselling, fish taken pursuant to the exercise of such rights.

22. Game defendants may submit to this court a plan for determining the identity and origin of fish classified by state law as game fish which are purchased by fish buyers within the State of Washington and for monitoring and obtaining statistics and records from such fish buyers in order that trafficking in game fish now lawfully taken by treaty Indian fishermen consistent with Final Decision #I in this case, and in violation of state law, can be detected promptly and appropriate action taken.

23. With respect to any item of fishing gear which has been seized or damaged or (as provided below) has been claimed to have been seized or damaged, by any of the defendants pursuant to statutes, regulations, orders,

practices, procedures, or actions declared and adjudged unlawful in Final Decision #I and which had not been judicially ordered forfeited or confiscated prior to February 12, 1974, the defendant having control, or who has been claimed to have control, of such gear shall:

a. provide all plaintiff tribes a complete list of gear so seized;

b. return such gear to the owner or his delegate on or before July 1, 1974; or if the ownership is unknown or in dispute as of July 1, 1974, return such gear to the tribe whose reservation is nearest the place of seizure or as otherwise directed by order of the court; and

c. on or before July 1, 1974, provide this court and all plaintiffs a full accounting as to each such item of gear and the disposition thereof.

24. Any member of any plaintiff tribe shall be entitled to invoke the continuing jurisdiction of this court as provided in paragraph 25 to make a claim to the return of gear allegedly seized or damaged by any one of the defendants, or of its fair market value, or diminution of value of gear returned under paragraph 23 which is not substantially in the same condition as immediately prior to seizure, if:

a. the claim arises from an act of the defendants after September 18, 1967;

b. he notifies the state Attorney General in writing of his claim on or before May 31, 1974 or within 30 days after the return of gear under paragraph 23 for claims for diminution of value; and

c. his notice describes in such detail as is possible under the circumstances, the time, place and manner of seizure or damage, the identity of the offending persons and the size, character and value of the gear.

As to any such notice, the state Attorney General shall provide a response to the claimant and shall report its contents with his accounting of July 1, 1974. If the response disputes the claim of seizure or damage by the defendants, the state shall accord the member an

opportunity to be heard on his claim and to inspect any fishing gear or other property of the type claimed that is in its possession, for purposes of attempting to identify it as claimant's property. Any dispute over the fact of such seizure or damage or over the value of such property which is unresolved sixty days after the notification submitted pursuant to a above, may be referred to either party to the court as provided in paragraph 25.

25. The parties or any of them may invoke the continuing jurisdiction of this court in order to determine:

a. whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision #I or this injunction;

b. whether a proposed state regulation is reasonable and necessary for conservation;

c. whether a tribe is entitled to exercise powers of self-regulation;

d. disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves;

e. claims to returns of seized or damaged fishing gear or its value, as provided for in this injunction;

f. the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I; and

g. such other matters as the court may deem appropriate.

In order to invoke such jurisdiction, the party shall file with the clerk of this court and serve upon all other parties (through their counsel of record, if any) a "Request for Determination" setting forth the factual nature of the request and any legal authorities and argument which may assist the court, along with a statement that unsuccessful efforts have been made by the parties to resolve the matter, whether a hearing is required, and any factors which bear on the urgency of the request. Any party shall have an opportunity to respond to, join in, or supplement the request within seven days of its service or such other

time as may be directed by the court. The court may then decide the matter, hold a hearing, or refer the request to the special master to hear evidence and legal argument, as soon as is practicable. If the matter is referred to the special master, he shall have authority to summon witnesses, issue subpoenas, hold hearings, and take such evidence as may be introduced and such as he may deem necessary to call for. The master shall, with all convenient speed, submit to the court, with copies to all parties (through their counsel of record, if any), a report of his factual findings, conclusions of law based upon them where necessary, along with his recommended disposition and reasons in support of it. The parties may submit to the court exceptions to the master's report. The master's report shall be subject in whole or in part to consideration, revision or approval by the court and in every case the court shall make the final determination. This injunction shall not alter or deprive the parties of any right to bring motions and other matters before this court as provided in the Federal Rules of Civil Procedure.

26. Defendants shall submit to the court and all parties on July 1, 1974 and each three months thereafter until further order of this court a progress report concerning those matters which they are ordered to perform by this injunction, stating in reasonable detail the actions taken to carry out the provisions of paragraphs 9 and 16 of this injunction and any other pertinent matters affecting fulfillment of the terms of this injunction and/or Final Decision #I.

INTERIM PLAN AND STAY ORDER PENDING FINAL DECISION ON APPEAL

The court having considered the need for an interim plan and having considered the interim proposal, now hereby orders that the following interim plan shall be in effect and shall be binding upon all parties to this litigation except as to tribes determined to be self-regulating. In making this order the court does so

reserving jurisdiction to make further modifications if the court deems them necessary and further orders a stay of portions of the injunction, final decision No. 1 and the decree of February 12, 1974.

The court now, therefore, orders, adjudges and decrees:

(1) Effective June 1, 1974, all off-reservation fishing areas in the case area are closed to Indian treaty fishing except to the extent that tribes adopt and file with the court and the defendants tribal regulations for the fishing activities of their members and specifying the areas to be opened to fishing by tribal members. Indians who engage in fishing activities not in accordance with those tribal regulations shall be subject to the same provisions of the state law as non-Indians engaging in fishing activities.

(2) The biologists of the defendants and biologists for the tribes shall meet to formulate general principles to be utilized as guidelines to be flexibly applied in the adoption of specific fishing regulations.

(3) The tribes, prior to filing with the court tribal fishing regulations, shall give the defendants an opportunity to meet with and confer with tribal representatives on the subject of such fishing regulations.

(4) The defendants are authorized to adopt and enforce with the tribes' approval tribal regulations as state regulations as to members of the tribe in question without the necessity of proving the need for conservation under the provisions of the decision.

(5) The defendants will make significant reductions in the non-Indian fishery, as are necessary to achieve the utltimate objectives of the Court's decision without requiring mathematical precision, but in making such reductions will do so consistent with the concept of permitting the full harvest of fish.

(6) The defendants will monitor the fish catch and the results and statistics from such monitoring shall be used in considering the regulatory pattern for the following year.

(7) The parties shall exchange all available data

concerning size, timing and condition of fish runs in the case area and the current level of harvest and escapement in response to reasonable requests for the same to assist the parties in carrying out their responsibilities.

The court further orders, adjudges and decrees that any portion of Final Decision No. 1, the Decree of February 12, 1974, and the Injunction of March 22, 1974, which is in conflict with the Interim plan is hereby stayed subject to subsequent orders of this court.[1]

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[1]In the original order, in sixteen paragraphs the court listed specific portions of Final Decision #I, the Decree of February 12, 1974 and the Injunction of March 22, 1974 to be stayed. In summary, these primarily dealt with two major subjects:

(1) requirements that state statute and regulations concerning the exercise of fishing rights must be established to be reasonable and necessary for conservation and must be promulgated consistent with administrative and procedural due process before they may be lawfully applied to treaty right fishermen; and

(2) the obligation of the state and its agencies to develop and enforce statutes and regulations relating to both treaty right and non-treaty right fishermen in a manner that will assure that the opportunity to harvest the anadromous fish resource at tribal off-reservation usual and accustomed fishing places is "shared equally," as that concept is defined in Final Decision #I, by the respective user groups.

Testimony in U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974)

Testimony of JAMES E. LASATER,
Assistant Director in Charge
of Management, Washington
Department of Fisheries
July 9, 1973 + August 30-31, 1973 + Sept. 14-17

A. My name is Jasper Elton Lasater and I reside at Route 8, Box 344G, Olympia, Washington.

Q. Where are you employed and what is your title?

A. I am employed by the Washington Department of Fisheries and my title is Assistant Director of Fisheries.

Q. What is your educational background?

A. I have a bachelor of science degree in fisheries from the College of Fisheries at the University of Washington. I took two quarters of post graduate studies to get several fisheries courses unavailable to me while getting my bachelor's degree. I have completed seminar courses in natural resources management at the University of California and at Penn State.

(1974 TR 434 lines 2-13)

Q. Is there a problem in ensuring that salmon native to areas fished by treaty Indians escape the ocean fishery?

A. Yes. The offshore fishery for chinook and coho salmon is taking a major portion of the harvest of those species and has led to severe restriction of the fishery in Puget Sound. Figures used by the United States in negotiating with Canada this year show that Canadian fishermen are taking approximately 83 percent of Puget Sound chinook salmon and approximately 65 percent of the coho.

(1974 TR 446 lines 7-15)

Q. Why not just set a fixed quota for the Indian catch?

A. The fixed quota system would provide for a fixed standard. The fixed quota, however, does not meet sound conservation practices. On years when the run is low, the quota catch may very well exceed the number of fish available for harvest and the quota of fish will be taken directly from necessary spawning escapement. For instance, this year we expect a very small run of chinook salmon to return to Puget Sound from international waters. We have closed the commercial fishery and reduced the sport fishery. An Indian commercial net fishery with a fixed quota on this run could be expected to reduce the spawning escapement below necessary or desirable levels, and that would be unsound conservation. Furthermore, a fixed quota will be unfair to fishermen, both Indian and non-Indian, and may well be unfair to the state. On a year when the run is low and the Indian quota will take the entire harvest, the all-citizen fishery then must be entirely shut down to meet spawning escapement goals. On a year when the run is very good, the Indian will be fixed to a quota which will be low on that year and the all-citizen fishery will have a bountiful harvest and the Indian will only catch his fixed quota.

(1974 TR 448 lines 13-32)

Q. Why are commercial reservation catches to be included in calculating the Indian fair share catch?

A. There are a number of reasons.

1. The reservation catch on a stream could be increased to the point that it took the entire harvest and the state would still owe the Indians a share which it could not possibly deliver.
2. Catches taken off-reservation would be taken to the reservation and sold from there, or simply reported as being taken on the reservation at the time of sale. There would be little chance of proving otherwise and the fishery would be unmanageable.
3. There would be an incentive to over fish, which the state could not control, and spawning escapements would suffer. As the run diminished, accordingly the productivity of the river would be reevaluated downward and the calculated fair share diminished. Salmon management would suffer, the Indian share would suffer and relations between the state and the Indians would impaired.
4. Indians with a reservation would have a great advantage over those without. The treaty fishery would then have different values for different treaty tribes, which is not fair on the face of it, and relationships between the tribes and the state and the tribes would suffer.

(1974 TR 471 line 28 - 472 line 17)

Q. Do you know of examples of poor management by Indian tribes?

A. Yes, one example is the catch of sockeye from the Ozette River. The Ozette River flows from Ozette Lake to the Pacific Ocean in the extreme northwest corner of the State. The area is unpolluted and, since few sockeye salmon are taken by the Washington ocean troll fleet and net fishing for salmon in the ocean is not allowed, virtually the entire run enters the river. Little fishing had gone on for some time due to the remoteness of the area which had led to abandonment of Indian residence in the area. Indians once again began net fishing for sockeye salmon in the Ozette River and in 1948 the catch was about 4,000 salmon. Catches rose to over 17,000 salmon and by 1952, one cycle of salmon later, had fallen to about 3,000 salmon. As is illustrated in Exhibit F-22, catches have continued to decline and now number less than 500 salmon annually. The Ozette River salmon run was grossly overfished by Indians on the Ozette

reservation, and continued fishing of the remnant run left is preventing its recovery.

The Quinault River sockeye run is managed by the Quinault Indian tribe. The spawning tributaries above Lake Quinault and the lake are in relatively their native state. It is true that the river and its tributaries shift about considerably which does affect spawning, but the river has always done so by its nature. Even though regulated by the tribe, sockeye salmon catches on the average have steadily declined over the years. Exhibit F-23 illustrates Quinault sockeye catches since 1936. Prior to 1950, catches exceeded 200,000 on two years. Prior to 1957, catches exceeded 100,000 salmon on eight years. Since 1956 the catch has never reached 100,000 salmon. Exhibit F-4 shows the catch of chinook salmon by Puyallup Indians and the return of adults to the Puyallup hatchery. The very large catch in the early 1960's precipitated the Puyallup court case and was followed by a period of no fishing so that the run might be re-built. Then the Puyallup Indians and the Federal Government claimed that Indians could fish as they chose within the boundaries of the old reservation and catches of chinook rose markedly in 1971 and 1972. About 1,000 chinook salmon are required by the Puyallup Washington State salmon hatchery. Keeping in mind that the catch or hatchery take in one year affects the return of salmon 3 and 4 years later, it can be seen that the large catches in the 60's is related to a poor hatchery return with no Indian fishing following 1965. The run was recovering following the closure of the river to fishing in 1966, as can be seen by the steady increase in the hatchery escapement in 1967, 1968, 1969 and 1970. The increase in the Indian catch in 1971 and 1972 has once again dropped the hatchery run below a level needed for hatchery operation. Since hatchery chinook salmon have a higher survival rate than do wild fish, over-fishing has a much greater impact on wild fish. The wild stocks of salmon have

suffered severely from over-fishing by Puyallup Indians. As is shown in Appendix III, Table 5 of the Joint Biological Statement, in 1971 the Department of Fisheries set one day each week of fishing from August 15 through September 18 to protect the expected poor chinook run. In that year Puyallup Indians sold chinook salmon on 31 days prior to September 18. Both the hatchery and wild segments of the run were over-fished. Once a chinook run is fished to a low level it takes a minimum of three cycles, or 12 years, to expect recovery. The Puyallup Indians effectively undid the recovery of the chinook stocks of the Puyallup River from the previous over-fishing.

(1974 TR 491 line 2 - 492 line 25)

The Department and Indians have a broad common interest in salmon which has enabled us to stay in communication with, know as individuals, and work with most Indian tribes. The following examples are not exhaustive but provide an overview of programs whereby the department works with Indian tribes.

1. **Salmon eggs provided for educational purposes**

   Example — The Skokomish Indian people, through guidance provided by a fisheries biologist from Small Tribes Organization of Western Washington, Inc., have developed a small educational salmon egg-hatching station on their reservation. The Washington Department of Fisheries has provided the chum eggs necessary for this small educational hatchery since its beginning, approximately 3 years ago. In 1972, the department provided 100,000 eggs for this station.

2. **Hatchery releases of juvenile salmon made at such locations as to provide maximum harvest by Indian fisheries**

Example — Two Department of Fisheries-operated salmon hatcheries are located within Hood Canal's drainage system. The George Adams Salmon Hatchery is located on a tributary of the Skokomish River immediately above the Skokomish Indian Reservation, while the Hoodsport Salmon Hatchery is located at Hoodsport on a small tributary of Hood Canal. Both hatcheries produce coho and chinook salmon. The Hoodsport Hatchery has also been able to develop relatively small pink and chum runs.

In order to reduce the numbers of adult salmon which have returned to these two stations in excess of the department's propagation requirements, the department has developed a program highly beneficial to the Skokomish Reservation Indian fishermen.

Coho eggs for both stations are taken at the George Adams Hatchery while fall chinook eggs, for both stations, are taken at the Hoodsport Hatchery. River flows at time of coho entry into the Skokomish River are such that coho escapement to the hatchery is ensured. Thus, maximum harvest effort on both chinook and coho is beneficial to the Indian fishery without damaging the resource.

This management procedure resulted in approximately 21,800 coho being caught by Skokomish Indian Reservation fishermen in 1970. Of those coho caught of hatchery origin, 50% were estimated to have been produced by the Hoodsport Hatchery. An additional 12,700 fall chinook were caught while only 1,356 fall chinook were allowed to escape to the George Adams Hatchery. With George Adams' fall chinook eggs ensured from Hoodsport Hatchery, this relatively small escapement has not been cause for concern in the past.

3. **Hatchery production released into non-hatchery streams**

   Example — One of the few rivers on which an Indian reservation is located in Puget Sound, which does *not* have a salmon hatchery on it, is the Nisqually River. However, to supplement the natural production of this river, the Department of Fisheries has made hatchery releases into this stream from its hatcheries located elsewhere. In 1971, 5,865 lbs. of fall chinook fry and 27,419 lbs. of coho yearlings of state hatchery-reared fish were released into the Nisqually River. This program was continued in 1972 and is programmed for 1973.

   These plants will increase the number of salmon returning to the Nisqually River above those which are produced naturally, thereby increasing the number of salmon available to be caught by the Nisqually Indian fishermen.

4. **Hatchery production releases into barren areas**

   Example — The headwaters of the Klickitat River originate on or above the Yakima Indian Reservation. Construction of fish passage facilities in the upper river at Castile Falls has opened an additional 20 miles of spawning and rearing area. Spring chinook and coho salmon juveniles have been and are being released into the upper river to take advantage of this potential production area and in an attempt to establish a natural run above the fishways.

   Any additional production realized from this program directly benefits the Yakima Indian dip net fishery located on the Klickitat River near its mouth as well as all Columbia River fishermen, Indian and non-Indian, both commercial and sport.

5. **Salmon runs developed where none existed previously**

Example — Several low-water upstream migration blocks occurred naturally in the Klickitat River (RM 2.2) prior to 1955 when the last fishway at these lower falls was completed. Due to these falls, only spring chinook were able to migrate into the Klickitat River prior to this time. Spring chinook, migrating upstream during high-flow periods, were able to negotiate the falls. In 1945 and 1951, respectively, fall chinook and coho were introduced into the Klickitat River in anticipation of the fishways being completed and used by these species.

In 1950, construction on the Klickitat River Salmon Hatchery was begun. Construction was completed in 1954. A total of 4,551,542 salmon juveniles consisting of spring chinook yearlings, fall chinook yearlings, and coho yearlings were released by this station in 1972. The 1971 Klickitat River Indian dip net fishery reported catch was 289 spring chinook, 2,466 fall chinook, and 4,055 coho.

6. **Cooperate State-Indian fresh-water rearing programs**

Example — The Tulalip Indian Reservation contains an ideal fresh-water rearing pond of approximately 2-½ surface acres with a direct outlet into Tulalip Bay. An agreement between the Department of Fisheries and the Indians was reached in the fall of 1970 for this pond to be used to rear coho salmon juveniles with the state supplying the fish and feed while the tribe supplied the necessary manpower and need. The fish were provided to the tribe in February, approximately 3 months prior to their normal release period. Natural spawning area is not available at this rearing location, and the eggs are

not needed by the Skykomish Hatchery. Thus, total harvesting effort is allowed on the reservation (Tulalip Bay) after the adult fish have passed through an extensive commercial net and sport fishery conducted by both Indian and non-Indian fishermen.

In 1971, 28,333 lbs. of coho yearlings, 50% of the Skykomish Hatchery coho production, were released from this pond. In 1973, an evaluation of the comparative production success of this program was begun by marking approximately 50,000 coho juveniles at the Skykomish Hatchery. These fish are to be released (along with 450,000 other coho juveniles) into this pond to again be fed and released as yearling coho in the spring of 1973. Indian peole were hired to mark these fish with funds supplied through the Bureau of Sport Fisheries and Wildlife and with equipment and facilities supplied by the Department of Fisheries. In 1973, 25% of the feed costs for this program will be supplied by the Tulalip Indian Tribe.

7. **Cooperative State-Indian salt-water rearing program**

Example — The department has cooperated fully with the Squaxin Island Indian mariculture program since its inception several years ago. The department has provided the chinook which the Squaxins rear in their salt-water ponds. In exchange, the Squaxins have released a specific poundage of relatively large salt-water reared chinook which have contributed to the local sport fishery at a very high rate. These delayed release and large chinook (2-to-3 per pound as compared to 100 per pound normal hatchery release size) tend to remain in Puget Sound and enter sport fishery catches.

In 1972, 6,000 lbs. of fall chinook were provided to the Squaxins. A total of 17,500 lbs. of

chinook is presently being released by the Squaxins for the department. These fish have been marked and the catches will be evaluated in the continuing program of enhancing Puget Sound sport fisheries.

8. **State-Federal cooperative salmon plantings into reservation waters**

The Bureau of Sport Fisheries and Wildlife operates the Quilcene Salmon Hatchery on the Olympic Peninsula. The hatchery facility programs several plantings into rivers running through Indian reservations. One example is the White River (Muckleshoot Reservation), a major tributary of the Puyallup River.

However, due to disease organisms which are specific to the area of the Quilcene Hatchery, the Department of Fisheries does not want these fish released into inner Puget Sound rivers. Therefore, rather than simply bar this transfer of fish, the Department of Fisheries releases salmon juveniles into the White River from its Puyallup Hatchery. In turn, the Quilcene Hatchery releases an equal poundage of young salmon into the streams of our choice of the Olympic Peninsula.

9. **Hatchery surplus salmon carcass giveaway programs**

The department's hatchery system usually receives salmon in excess of its propagation needs, especially coho salmon. It is the department's policy to provide numbers of these fish, which are fit for human consumption, to our economically-depressed Indian people.

Indian tribal representatives are contacted when these fish are available and it is their responsibility to see that these fish are distributed to their respective tribal members. In 1972, 256,194 lbs. of salmon which had returned to the department's hatcheries were provided to Indian people.

10. **Cooperative State-Indian rearing programs which provide maximum benefit to all resource user groups**

Example — The Lummi Indians are operating a salmon and steelhead hatchery on Skookum Creek, a tributary of the Nooksack River. Once this hatchery is able to develop its own salmon runs, its future egg source will be ensured.

(1974 TR 494 line 1 - 498 line 33)

Q. Okay, I am trying to get there. Suppose instead of a fixed percentage from the Court you had the tribe each year tell you how much they were going to take, how many units of gear, how many fishermen, where and on what species and during what period of time. Wouldn't that eliminate the problem of having a fixed percentage and a different actual take by the tribe in that year?

A. The conversations I have had with Indian tribal officials in the past have shown that at least at times their plans and claims for what they will do and what they will take have not always been carried out, nor do they meet the test of conservation.

(R811 lines 6-19)

Q. Now, turning, if you will to 1973, the sockeye fishing season on Lake Washington, did you have a season for fishery there?

A. Yes.

Q. How many clients did you have fishing there?

A. The commercial fishery was closed this year because we didn't expect a run of commercial size. The sports fishermen fished and the Indians fished.

Q. By the way, are the Indians allowed commercially to market their sockeye take from Lake Washington?

A. Yes.

(R832 line 18 - 833 line 4)

Q. Page 17, if you would, at the bottom at line 26, the question is asked, "As a general matter do you have any opinion as to whether the Department of Fisheries could regulate the commercial and sport fisheries for salmon to provide a greater volume of fish from which the Indian tribes in this case could take?"

If you were asked that question, Mr. Lasater, what would your answer be?

A. I would say yes, provided that we had some legal parameters within which to work. In other words, if we were to take fish from the all-citizen fishery unlawfully, in other words, not in provision with a special right or go beyond the special right, then I would say we would be limited and could not do it. The fishery could be regulated to put more fish in, yes.

Q. Let's assume that the legal instruction to you was for all of those rivers from the edge of the northern Sound southward, you should increase the salmon runs to those rivers and the Indians would crop them on all of the rivers where the fisheries occurred, could you accomplish that?

A. To a limited degree. There are many salmon that are taken outside of our jurisdiction that would limit our capabilities in this. But to a limited degree based upon some of those limitations, yes, we could.

(R894 line 24 - 895 line 25)

A. I think that a percentage would far better serve conservation and management of the resources. Sometimes it's easier to work with very arbitrary figures, but you may not like how it comes out, but it's easier to work with. The results may be terrible, but it's easier to work with.

I believe that the percentage method is going to give us the best end result.

Q. From a conservation standpoint?

A. Yes.

Q. What difference does it make whether you're given a percentage figure or a number to work with from a conservation standpoint? Why would it make any difference?

A. If you have a percentage and it's a percentage of available harvest or production above and beyond the spawning escapement, one of the things that immediately happens is that you never impact spawning escapement.

The other things is that when the run goes up at a high level under a percentage share, the fisherman get more fish. That to us is a just and fair way of operating. When there are more fish the fisherman should get more fish. We don't think he should be fixed to a quota that doesn't reflect the run size. In hard times when we are unable to give the large run, then we think that the person has to share in the low runs as it has always been.

(R912 line 4 - 913 line 6)

THE WITNESS: May I respond to you? I am not sure of my ground here. The salmon run as it approaches — we have to spend months preparing our management scheme or plan. It starts as soon as one run is over, and it takes a great deal of work and a great deal of time to do it properly for the entire area we are working with, and if at the last minute that whole plan is challenged and the fish are coming, there is no time to devise a new plan, you see, and salmon cannot be saved. They are going up to die when they are through spawning, and the resource has to move quickly and decisions have to be made quickly, and times — just for instance, in the management of the run going to the Frazier, it means a quarter of a million fish a day. That is not uncommon.

If you wait for three days you are tied up for three days and can't decide because of the litigation or injunction or some such, there goes three quarters of a million fish, and it is wasteful, and it is going to hurt conservation of the resource.

(R989 lines 7-25)

Q. Now, you explained that there is some difficulty for the Department when the method of determining the Indian harvest is subject to repeated court challenges. Could you explain to us and refer to Exhibit F-5, the process that you go through in regulating, in adopting your regulations?

A. Yes, I can. This chart isn't outlined —

THE COURT: Can you gentlemen all see this? We will turn it around a little more for you. Thank you, that is just fine. I can see it from there, too.

A. (Continuing) This chart is an outline of the steps that are followed to establish commercial salmon regulations by Washington State Department of Fisheries. The last of the commercial season ends at the end of November, so starting immediately in December and January we begin to review the previous season's fishery and analyze it. You learn from each season, and this also gives you an idea starting right then, of how we might have to adjust our fisheries for the following season to improve ourselves, do a better job. By January we are getting our predictions or forecasts of the run size for the coming season. We then, the staff prepares regulation proposals and reviews them based upon analyses of the fishery and predictions.

These proposals after they go over and are worked on at some length by the staff, are brought by the staff members, brought to the attention of the management division and the patrol division, because the people that want to are responsible for achieving the catch and escapement. You can't put burdens on your enforcement people that they cannot meet. They

often will want to say, well, maybe you would like that line there, but fishermen aren't going to find it. If you move it a little bit there is a light they can see. That type of thing goes on.

The revised proposals after they are all reviewed by our divisions, are presented to the administration for review, and subsequent approval, modification or rejection. The Director has the authority to accept or ask for modifications, or can actually reject staff recommendations, as you may well know.

By early March we have decided on those regulations for the coming season. The management pattern which we propose and these are mailed out to all segments of the commercial fishery, sports interests, Indian tribes, license holders, the news media, and individuals who have requested such information during the last week of March or the first week of April. It has to be 20 days after we make our recommendations public, we hold a public hearing where the proposals are orally presented. Written material is handed out. There is justification made for those regulations, and we have public comments on those regulations in person or they have come in in letter form or telegrams that are read into the record.

Then for several days we allow a period to consider all of the proposals that have been made to us for changes in those regulations, and decide whether the Director will accept the recommendations or whether he will reject them or accept part of them. Then we have an adoption hearing, public hearing, where we adopt the regulation pattern decided upon. It will affect the coming fishing season.

By late in the spring or mid-spring, late May, we have made regulations summaries and mailed these out to the people or organizations that got our proposals, so they will know in summary form what regulations they are expected to comply to when they fish. Then the season starts and as the season develops and we get more accurate information on the

actual run size and we see how the fish are behaving, which affects the fishery, and we see how the fishermen are behaving, because they may change their pattern of fishing, we make emergency regulations to get our spawning escapement and allow the proper harvest.

So we make these emergency regulations commonly on a 24 hour basis notice to the fishery to change things, to properly reflect run size and actual conditions as they develop.

(R1079 line 7 - 1082 line 18)

FURTHER REDIRECT EXAMINATION

Q. (By Mr. McGimpsey)Mr. Lasater, Mr. Getches was just taking quotes out of the Joint Biological Statement back and forth which indicate that the Department does have, for each of its respective clients different goals, and some of those goals relate to other things than strictly achieving spawning escapement.

Is that a fair statement?

A. Yes, I believe so.

Q. Now, can conservation, can that term and that concept exist in a vacuum?

A. No, it does not. Once you have met the basic element of conservation for salmon, which we have said is spawning escapement, and you have hopefully additional fish that may be harvested, then you are going to have to regulate so that these fish can be taken. In regulating so that they can be taken, you at the same time must regulate so that they don't take too many and you achieve your spawning escapement.

The two go together. You cannot have one without the other.

Q. Now, when you have different goals for the sport fisheries, like maximum sustained recreational yield,

and different goals for non-Indian commercial fisheries like maximizing their profits, are those goals considered independently of the goal to achieve for the Indians what you have called a fair share?

A. Yes, I believe they are to be considered independently. You have to consider the treaty right first, as I understand it. It has a prior or higher priority. You can only consider these others after you have met the treaty rights, as I understand it.

Q. In the pure biological sense of the term "conservation," in other words, preserving the species from extinction, in that sense of the term, could you regulate any fisheries if you had more than one user without having to take into consideration the allocation of the harvest among those user groups or the fact the harvest would be allocated among them?

A. You have to consider that the harvest will be shared among your separate user groups in some way, and you consider the legal framework that is allowed to you within which you can operate.

Even history comes into play as regulations have been developed over the many years. So, you do have to consider in our society, where we adopt public hearings, where the public has input, the wishes of the various clients that you are working to get fish for.

Q. Mr. Hovis spoke of some of the goals at least of his tribal members that they wished to fish for ceremonial purposes and personal use purposes and commercial purposes in that order of priority.

Would these be goals that are other than conservation goals which might affect the decision of the Department?

A. Yes, they are, and they have affected our decisions.

Q. And these goals would be what? What would be the purpose of using these goals in your regulations?

A. The purpose is, I believe, because the Indians want them that way. I have no personal interest as a person

in preserving an Indian ceremonial. I recognize their value in preserving a ceremonial and am perfectly willing that regulations be set so that they can have ceremonial fisheries.

Q. Now, when you set a regulation for a ceremonial fishery, does the problem of conservation always become a matter that fits into that decision?

A. Yes. We were particularly concerned this year when we had on the Columbia River requests for ceremonial fish coming in when we had a summer Chinook run that was about half of the low run we predicted. We were concerned that ceremonial fishery might affect the conservation of the resource.

Q. Now, generally the extent of that ceremonial fishery would weigh with the conservation necessity, would it not? I mean, the greater the ceremonial fishery, the greater the conservation problem?

A. Yes. There is a difference between wanting a couple hundred pounds and wanting two thousand pounds.

Q. And isn't that true of any other objective that you would have for any fishery; that if you weighed that particular objective that there would be some conservation aspect of your decision making?

A. Yes. They relate. They always do.

Q. Is there any way to have objectives in vacuums that never relate to conservation and conservation never relates to other objectives?

MR. PIERSON: Your Honor, I don't know how the witness can understand that question. I sure can't.

Q. (By Mr. McGimpsey) Do you understand it, Mr. Lasater?

A. Yes, I do.

Q. Would you answer, please.

A. I believe that as soon as you have met the ultimate goal of conservation and have fished for harvest and try to meet objectives of the people who are going to harvest, if they just want to fish to eat, then you must

consider how he's going to take that fish out without detracting from the conservation of the species.

(R1160 line 15 - 1165 line 3)

Q. Can this percentage share model work if the Court would not allow the Department to consider catches on Indian reservations as part of the Indians' share in the total plan?

A. I don't believe so. First of all, we don't see that the reservation, per se, has anything to do with the treaty right to fish. Many of the tribes, in fact, do not have reservations.

But when Indians fish off-reservation, they often land their catches on-reservation or take them to the reservation for sale. If the reservations were exempted, there would be great pressure to make a great increase in the reservation catch because it would not count.

I would expect that this might put strong pressure to over fish, and then there would be great incentive to take all fish to the reservation for sale so that they would not count on the percentage.

I can't believe that we can control or fairly regulate a percentage under those conditions.

(R3605 line 22 - 3606 line 18)

Q. Could you explain what the sockeye fishery was this year?

A. Well, first of all, in that year we had a commercial season in Puget Sound for sockeye. This gave us a commercial catch. In 1973 there was no commercial fishery allowed. So the catch is divided entirely between sport fishery and the Indian fishery on Lake Washington, with the exception of a few that might have been taken in the Strait of Juan de Fuca, but most of those would have been taken by Canadians.

(R3626 lines 14-23)

Q. Now, directing you attention to the fall Chinook run in 1971, did you set a special Washington Department of Fisheries season or permit operation for Muckleshoot Indians?

A. I believe.

Q. What rivers?

A. It would be the Green River or lower Green River, it is called the Duwamish in the lower reaches.

Q. How is that regulated? Was that a seasonal regulation or a quota regulation, how did you do it?

A. There was a permit that set them so many days a week to fish.

Q. And were there commercial fisheries out in the marine area to that run?

A. Yes.

(R3787 lines 4-20)

Q. Do you know whether the Department of Fisheries could manage to provide such a 50 percent share to the Makahs and Lummis?

A. I doubt it. I just think that there is a large enough number of fish moving past, knowing the number of fishermen they stated and their gear, I don't think they could intercept 50 percent.

Q. If they had help from other Indians, do you think they could?

A. If they got enough gear out there, they could. It would have to include purse seines as well as gillnets I would think.

Q. Do you have any other reason to say that the Department of Fisheries could not manage such a 50 percent share?

A. I don't think I know what the legal implications are to know if we could manage it or not from a legal standpoint at all.

Q. I'm asking you as a biological expert whether you know of any other reasons why the Department of

Fisheries could not manage such a 50 percent share. I think you could regulate the fishery that way. There would be a lot of difficulties involved by making additional splits.

(R3838 lines 3-25)

Q. Directing your attention, if you will, to the Indian fishery on Lake Washington, are there any Indians there besides Muckleshoot Indians?

A. What year?

Q. 1972.

A. I believe there were some Snoqualmies.

Q. And was that according to the arrangement with the Department of Fisheries?

A. We had told some Snoqualmie fishermen they could fish under the same arrangements as the Muckleshoots.

Q. And this year you have had an Indian fishery on Lake Washington, have you not?

A. Yes.

Q. And were the Snoqualmie Indians there also?

A. I believe so, yes.

(R3844 lines 10-24)

If I assumed that, then the next problem is that there is great incentive to increase the reservation fishery and decrease the off-reservation fishery in order to get your share higher and higher, but it doesn't count.

Q. Why wouldn't they have that incentive now since they already can fish on a reservation?

A. They are not afforded a particular share. If they are guaranteed a particular share that wouldn't count against another share, then the incentive would be to take the share under the law and then get as many fish as you could otherwise to boot. It would be open ended.

Q. Why wouldn't they now get as many fish as they possibly can on-reservation?

A. You see, if we had a — they will do this up to a degree, but I don't say that everybody fishes that could, and I heard testimony that there is some empty sites. But if you had a guaranteed share and then the opportunity to catch even more that weren't counted on the guaranteed share, then there is great incentive to get as many on the share that doesn't count as possible.

(R3962 line 3-32)

Testimony of CARL M. CROUSE,
Director, Washington State
Department of Game
August 27+28, 1978

Q. Maybe more directly I can say when you are confronted with a claim in a treaty that Indians have a right to take from the Steelhead resource, and you compare that against the statements I have read about the ultimate recreational use for sportsmen, isn't it true that you concentrate and consider only the interests of the sportsmen?

A. When we are confronted with what we claim are treaty rights for fishing — and I think you understand that we do not claim any jurisdiction on reservations for any type of wildlife, including the fish we are responsible for — we have, and we will continue to follow any legislative act, any congressional act, or any ruling of any court that we have these cases before that came up. We are extremely pleased when we can get a clarification of what our position is.

To this date, we do not feel there has been a ruling within the parameters that we are responsible to allow commercial fishing by a special group on the rivers.

(R113 line 3-22)

Q. Mr. Crouse, do you have any limit on the number of sport fishing licenses and punchcards you issue every year?

A. No, we do not.

Q. Are you allowed to limit that number?

A. No.

Q. Do you have bag limits on the number of fish that sport fishermen can take?

A. Yes.

Q. What is the limit?

A. Two per day, 30 per season.

(R172 lines 14-24)

Q. Isn't it accurate to say that even including the Indian net fisheries for steelhead on reservations in the State of Washington, you have no information available to you indicating that any such net fishery has destroyed the steelhead run?

A. They have not totally destroyed them, but certainly this reduces the other catch, and certainly we recognize that there is a commercial fisheries for steelhead on Indian reservations.

Q. You say "reduce the catch." You mean reduce the sport catch?

A. It certainly does.

Q. Has the resource been preserved?

A. We have preserved it, yes.

(R256 line 19 - 257 line 8)

Q. Finally, Mr. Crouse, is it not a fact that the basic position of the Game Department has been that it is unwilling, unless absolutely forced to, to participate in the diminution of the share of steelhead available for sports fishermen?

A. Yes, our position has been that we feel steelhead by the very nature are a fish that lend themselves to our

recreational use, and this is a higher and better use for them than commercialization.

(R314 line 5-13)

Testimony of WALTER A. NEUBRECH,
Retired Chief of Enforcement
Washington State Department
of Game

August 29, 1973

CROSS EXAMINATION

Q. (By Mor. Ziontz.) Mr. Neubrech, you have retired now from your position with the Game Department, effective July 31, is that right?

A. Yes.

Q. And that completed a career that spanned thirty-three years?

A. Thirty-six, I believe.

Q. As I understand it, you commenced in 1937?

A. I actually commenced in 1935.

Q. What was your job title when you began?

A. I was Deputy Game Protector.

Q. And would that be a title that would be more commonly referred to as a Game Warden?

A. In the early days, it was considered Game Warden. At the time I went to work it was considered Game Protector.

Q. When you retired, what was your title?

A. Chief of the Wildlife Management Division.

Q. In that capacity, were you the chief enforcement officer for the Department of Game?

A. Yes.

(R572 lines 1-22)

Q. Now, what is the procedure that is followed when you decide that the operator of the net is not going to return and you take the net?

A. The net is brought to one of the state installations to be cleaned and prepared for storage, marked and stored.

Q. Where are your installations?

A. Throughout the State of Washington.

Q. Every office of the State Game Department may have some nets there?

A. Yes. Let me correct myself on that, there is only about four or five of the offices in the state that are dealing with this particular subject, so I confine it down to about five of them.

Q. All right. And in those cases the nets are brought into that office, they are cleaned and the debris and fish are taken out of it?

A. Yes.

Q. What is done with the fish that are taken out of them?

A. Commonly the fish are deteriorated to the point that they are of no value and they are destroyed. Sometimes they are given to the County installations or state installations.

Sometimes they are given to the schools.

Q. Have your officers ever appropriated any of those fish to their own use?

A. I can't answer that, I don't know.

Q. Is there any rule or policy of the Department regarding what disposition must be made of those fish?

A. Yes.

Q. What is the rule?

A. That they not be used for their personal use, but given to some institution or — some charitable institution or some institution of the state government.

Q. Well, is that a written rule or sort of an understanding?

A. I think it is a written — I believe — I think I'm correct that this is a statement of policy in a policy manual.

Q. Did you not testify that there may be cases where that policy was not followed?

A. I am assuming there must be.

Q. Now, with respect to the nets, what is done with those nets?

A. I stated before, they were cleaned and stored in our warehouses or in our buildings.

Q. And then what happens to them?

A. Well, they are still stored there.

Q. Do you mean you take no action to have any court declare a forfeiture or a confiscation?

A. No, we have not. We have debated that for some time, but we have not done it.

Q. Does that mean within the possession of the Game Department there is still hanging nets that were confiscated as long as twenty-five or thirty years ago?

A. I think I'm right, I think we did, if I am not mistaken, give to the tribal — the Nisqually Tribal Council on two different occasions — we did give them a battery of nets, and I would hazard a guess, I am going to say 30.

We returned them to the Tribal Council on the condition that they would not be permitted to be used off of the reservation.

Q. But aside from those 30 nets, would you say still that you have a substantial number of other nets that were confiscated?

A. Yes.

Q. About how many would you estimate there are still on hand all around the state?

A. 70. I would like to qualify my remarks again by saying that there are nets and then there are nets. There are

some that are of practically no value, and perhaps should be destroyed, they have not been.

(R603 line 1 - 605 line 18)

Testimony of DR. BARBARA LANE,
Plaintiffs' Expert Anthropological Witness
September 5-7, 1973

If I may refer you to the Skokomish report, which I see is marked USA-23, on pages 12 and 13. If I may read from that section.

A. If you choose to do so, please do.

A. (Reading:)

"With respect to those property rights, it should be observed that although the weirs as such were community property, the individual dip net platforms on the weir from which all net fishing was done were privately owned.

"The content of these group and individual ownership rights is more precisely described in the folowing passages from Elmendorf, 1960, page 72.

'A number of men in one village community would build and own a weir together. Each man owned one dip net platform on the weir; all net fishing was done from these platforms. What an individual caught and dried was his own. If he made a good catch, it was customary to give a feast and feed his fellow villagers; what was left over was usually smoke dried and belonged to the person who had caught it.

"A person might sell or trade fish, but only outside his own village. Offering food in sale or trade to a fellow villager has never been done; the impression was gained that as a hypothetical case, such conduct would have been regarded as

scandalously stingy. Sold or traded fish was almost always smoke preserved.' "

Then he goes on:

"Dip net platforms were not sold or rented, but an owner often lent 'use of his platform to a relative or friend. According to an informant, he would say 'do dipnetting with my dipnet.' The borrower got all his catch and was not required to pay for the use of the platform. Public opinion required him to distribute part of his catch to the villagers if the catch was a good one, but he was not expected to give more to the owner of the platform than to anyone else. Platform borrowers apparently included, in practice, any fellow villager of the owner.' "

That is the end of the descriptive material from the ethnographer of the Skokomish, and I went on to say then:

"The fact that use rights to individually owned dipnet platforms were freely extended to fellow villagers in no way diminishes the ownership rights in either the platform or the dipnet itself.

"Concepts of ownership were highly developed and rather precisely formulated, not only in Twana culture, but in most, if not all, cultures of the Northwest Coast. While use rights were freely extended, it was necessary for the borrower to request permission to use the privately owned site, gear or privilege and for the owner to accede to the request. Alternatively the owner could initiate the extension of use rights by offering them.

"The absence of formal payment or rent for use rights was common throughout the Northwest Coast culture area, especially when the user was either kin or fellow villager of the owner. The lack of payment or requirement for same was an expression of solidarity between the owner and the user.

"Formal rent or payment for use of resource areas or gear expressed a more distant status relationship between the contracting parties. The presence or absence of consideration paid for use rights spoke to the relationship of the parties to the transaction but said nothing in regard to concepts of ownership."

(R1767 line 9 - 1770 line 2)

Q. Return now to page 26 of your report. You state your opinion that no such restrictions, referring to fishing, methods of fishing, were indicated by the commissioners or contemplated by the indians.

My question is: Do you believe —

A. Excuse me, Mr. Coniff. It would be helpful to me if you would let me know when you turn to the page, where on the page.

Q. I am sorry, I will slow down. I am on page 26.

A. Yes.

Q. I am at the top of the page, and I will read the first two sentences that I am concerned with.

A. Yes.

Q. "There is no mention of restrictions as to purpose, times or method of taking either in the treaties themselves or in the official records relating to treaty proceedings. It is my opinion that no such restrictions were indicated by the Commissioners or contemplated by the Indians."

My question is this: In view of the abundance of the resource, do you believe that any such restrictions were necessary at that time?

A. No, I do not believe they were necessary at that time.

Q. Do you believe, is it your testimony then that neither party would have contemplated need for any such restriction, if I understand your testimony correctly?

A. Just let me make one thing clear. When we speak of restrictions, we are speaking of restrictions on the Indian.

Q. Restrictions upon the fishing activities engaged in by the Indians?

A. Yes. And I am sorry, what was the second question? I just wanted to make sure that we were speaking here, and we understood each other, that this was relative to the Indians.

Q. Is it your testimony?

A. Yes.

Q. That neither party to the treaty contemplated the need for any restriction on Indian fishing activities?

A. I don't think I have so testified anywhere.

Q. You state that no such restrictions were indicated by the Commissioners or contemplated by the Indians, and I'm asking you, if I am interpreting your testimony correctly, if that is what you meant?

A. You are interpreting my testimony incorrectly. I said, indicated by the commissioners and contemplated by the Indians. I said nothing about what might have been contemplated by the commissioners.

Q. Do you belive that the commissioners contemplated the needs for such regulation of Indian fishing?

A. Well, Mr. Coniff, my answer to that, of course, would have to be in the realm of speculation, since I have already indicated in the passage that you read that they give, no evidence on this matter.

The only evidence that I can draw upon to form an opinion is the evidence of salmon, and the knowledge of this resource and the need for regulation of it or restriction of harvesting, which those government people who were with the Commission party would have been aware of or privy to in their time, and at that time they would have been aware, they could hardly have avoided, I think, being aware that this was a resource which could be dessimated, could be destroyed and required regulation.

I think at the time of the treaty there is no question that the restrictions were not necessary. If I

were asked to give an opinion, which I have here, which you are asking me to do now, I think it is very highly probable, very, very likely that they must have realized that restrictions would be necessary in the future, but they said nothing about it here.

Q. Further along on page 26, on paragraph C, you express your opinion regarding the meaning of "in common with all citizens of the territory," the language of the treaty?

A. Yes.

Q. My first question is this: Do you believe that at the time the Indians entered into these negotiations and signed the treaties that they recognized they were being asked to move to a reservation?

A. Yes.

Q. Do you think that the Indians understood at the time that they entered into these treaties that when they moved onto these reservations that these reservations were to be their exclusive homes, they would have exclusive rights to fish or to live, to deal with the land on these reservations?

MR. PIERSON: Just for clarification, I am not sure I understand what he is talking about when he says, "these reservations."

Q. The Indian Reservations that were clearly contemplated by the treaties and by the treaty minutes, I believe it was clearly indicated that it was explained to the Indians they were to wander around no longer. They were to move onto the reservations, that would be their home.

A. Partly correct and partly incorrect, I believe, Mr. Coniff. The official proceedings, the papers that accompany the treaty documents themselves, and all of the ancillary literature make it quite clear that what was contemplated to at least what they said they were talking about on the part of, and I believe it what they intended, on the part of the treaty commissioners, was the Indians should remove their

homes to the reserved lands, which would be exclusively theirs, and secured from intrusion by whites.

Q. This is a real problem that the treaty commissioners themselves were aware of, was it not, the fact that white settlers were coming in?

A. The situation was that the government of the United States at that time had created a legal dilemma, in that when they — I'm sorry, I forget dates here — when the Territory was set out, the legal provisions were that Indian title to the land would be extinguished.

But before they had taken any steps to do that, they had passed the Oregon Donation Act, which gave inducements to non-Indians to enter the Territory — this was even before Washington and Oregon Territories of course, were separated — to come in and take up lands, lands to which the United States Government had not yet extinguished Indian title.

The government was very concerned, and the treaty commissioners were concerned, Stevens was concerned, and this is contained in letters that he sent to people in Washington, D.C., before he was appointed commissioner to draft these treaties urging the importance and urgency of extinguishing Indian title in order to prevent collisions between the settlers, who thought they had the right to go and take up donation claims, and the Indians, whose title had not yet been extinguished.

They were concerned not only with collisions between the settlers and the Indians, but also with trouble with the settlers who felt they had been given inducements, and made a very arduous journey by oxcart across country, through very difficult terrain, to hostile Indian territory in some cases, to go up and locate there, and they felt the government should take care of the title business because they were angry with the government as well as fearful of trouble with the Indians.

I might say that the history, the context of this was that the boundary between the territories of Great Britain and the United States had not yet been settled at that time.

At that stage it was thought that all of the country from the Columbia north might become British and that south of the Columbia, American.

There was a rush on the part of both sides to get settlers into that country, to make a claim of the fact of having population of their own nationals already there on the ground.

So, the question of treaties was not because the government was trying only to protect the Indians from collision with the whites over land, but rather to clean up its own legal mess vis a vis its own citizens.

Q. In the course of your answer you used the term "Indian title."

A. Yes.

Q. How would you define that term?

A. I don't define it. I'm merely quoting the terms that were used in the letter of instructions to Stevens, the term that Stevens used in his first territorial address to the legislature here, when he explained to the citizens that the first pressing order of business was the extinguishing of Indian title to the land in the territory.

Q. Do you feel that the treaties accomplished that goal?

THE COURT: I hesitate to intrude, but I think we have been diverted on a limited area from the original question and answer that was given. I think you went off on a bypass, and I am anxious to hear the remainder of the witness' views on this matter of the residence of the Indians, what was contemplated that the Indians should do with respect to remaining on the reservation.

That I was listening for, and you got off on this very illuminating and interesting subject. I am not

criticizing it, but I want to hear what the rest of that answer is.

THE WITNESS: Thank you.

THE COURT: I consider it very important to this case.

THE WITNESS: If I may continue.

There is no question I am not giving opinion here. I am relating to you what is available in the contemporary documents by Stevens, by Simmons, by Gibbs, and it is clearly set out in a number of instances, both to the Indians and to the whites, but the purpose of the reservations is to have the Indians remove their permanent homes there, and there they will be safe from intrusion by any whites within the boundaries of the reservations, but that they will be free to go as formerly to their fisheries, to collect berries.

This is simply that they had agreed to keep their permanent homes there, but they are in no way restricted to the reservations.

To the contrary, there are explicit assurances that they should only keep their homes there so that there isn't the problem and so that the whites could move onto the ceded territory without any conflict with the Indians.

Q. (By Mr. Coniff) Do you believe, then, that the Indians understood that the reservations were to be their exclusive areas ceded?

A. Yes. Well, excuse me. I think we need a clarification there. This is the way it is stated at some places. At other places, for example, in the proceedings of the Quinault treaty, Governor Stevens is on official record there, in the official treaty proceedings as saying to the Indians, "You don't have to remove to the reservation if you don't want to. If you want to stay where you are and the local whites want you to stay there," — as the local whites were insisting, because they liked having the Indians as neighbors. They were

living in harmony and cooperative economic enterprises, and so on — "you're free to do that."

What they were doing is reserving certain lands to which the Indians could remove without fear of that ground bringing them into conflict with white settlers.

Q. Being invaded by the white settlers? Their reservations could not be invaded by the white settlers; is that it?

A. Yes.

(R1848 line 22 - 1858 line 14)

Q. This is a real problem that the treaty commissioners themselves were aware of, was it not, the fact that white settlers were coming in?

A. The situation was that the government of the United States at that time had created a legal dilemma, in that when they — I'm sorry, I forget dates here — when the Territory was set out, the legal provisions were that Indian title to the land would be extinguished.

But before they had taken any steps to do that, they had passed the Oregon Donation Act, which gave inducements to non-Indians to enter the Territory — this was even before Washington aand Oregon Territories of course, were separated — to come in and take up lands, lands to which the United States Government had not yet extinguished Indian title.

The government was very concerned, and the treaty commissioners were concerned, Stevens was concerned, and this is contained in letters that he sent to people in Washington, D.C., before he was appointed commissioner to draft these treaties urging the importance and urgency of extinguishing Indian title in order to prevent collisions between the settlers, who thought they had the right to go and take up donation claims, and the Indians, whose title had not yet been extinguished.

They were concerned not only with collisions between the settlers and the Indians, but also with trouble with the settlers who felt they had been given inducements, and made a very arduous journey by oxcart across the country, through very difficult terrain, to hostile Indian territory in some cases, to go up and locate there, and they felt the government should take care of the title business because they were angry with the government as well as fearful of trouble with the Indians.

(R1854 line 1 - 1855 line 9)

Q. You have no opinion.

Now, we move along in the treaty language itself on the Medicine Creek Treaty, which is typical of the Stevens' treaties, we then find the following language after the erecting of temporary houses for the purpose of curing,

> "—together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands;

My question is: Do you have an opinion regarding the language which states, "together with the privilege of hunting, dot, dot, dot, on open and unclaimed lands"?

A. You are asking me for my opinion?

Q. Do you have an opinion?

A. Yes, I do.

Q. Would you state your opinion?

A. My opinion is simply that I notice a distinction in terms with regard to fishing, a right is mentioned and with regard to hunting, a privilege is mentioned, and I would presume that there might have been this kind of difference contemplated that the whites understood that the land was going to become heavily populated with whites, it was going to become settled and,

therefore, game would be reduced and possibilities of game would be reduced.

The same with regard to berries, I think they contemplated the land would be taken up in large part and this would reduce that resource, and this may have had something to do with the language that is mentioned here.

With regard to the pasturing of horses, on unclaimed lands, there is specific documentation on that, I think it is quite clear to understand what was meant by that. Both the Indians and the non-Indians it was contemplated would pasture their horses on common ground, and is referred to in the British countries today as — I don't know about here, as, "On the commons." In Norfolk you still have commons where sheep graze and in Canada we have commons. This was common ground which was public grounds, which was used by people in common in that they are not — and it was thought there would be places like this remaining because the open grounds of this sort were described as being areas that the settlers did not wish to take as places for their homes. They preferred to settle at the edge of the open ground in the treaties, and so I think it was contemplaced there would always be these open spaces where everybody would have their horses gazing in common. There was this problem, and there are other provisions about taking care of the horses, and there is a distinction clearly made here between this kind of ground and then the privilege of using these — the right of taking their fish at all their usual accustomed places. To me the two are being separated quite clearly in this clause, that's my opinion.

Q. Now, earlier you stated that the Indians understood that they were to remove themselves to the reservation, this would be their home area that they would live there or they could live there if they so desired?

A. I think it was hoped most of them would live there.
Q. And I think you said the Indians understood this at the time they signed the treaties?
A. I didn't say that, I said that's what they were told.
Q. That's what they were told?
A. Anything that they understood there, I'm giving my opinion, I have no documentation as to what they understood.
Q. When you are giving your opinion without documentation would it be fair to say your are speculating?
A. I presume so.
Q. Do you have an opinion as to how the Indians could have understood the concept of on-reservation status under the treaty and also understood the in common with language of the treaty to mean exclusive right?
A. I'm sorry, may I hear that again?

THE COURT: Read it back.

(Last question read by the Reporter)

A. I have no way of knowing how the indians could have understood the "in common" with language based upon —

THE COURT: I think it would be desirable to break that question in two. Really, you are asking about two different things, and may I suggest we take one at a time.

THE WITNESS: Let me perhaps clarify —

THE COURT: Do you remember the question?

THE WITNESS: I think so.

THE COURT: Take the first question.

THE WITNESS: You are really asking me about two different things here, yes. All right, the Indians understood that the reserved lands were reserved exclusively to them, they understood that no whites could invade the reservations, and where tnose reservations were located so as to include usual and accustomed Indian fisheries, which some of them did, I think the understanding of all parties concerned was

that no whites could go onto thc reservation and use those fisheries.

I think what was understood and what was contemplated, certainly by the Indians, regarding the usual and accustomed fisheries off the reservation was that they would be using those as they had before but that whites would also be fishing in areas off-reservation, and I think that the problem which we are dealing with here is exactly what the content was of the Indian off-reservation fishing and the non-Indian off-reservation fishing with regard to this provision.

I tried to explain it before in the summary, I think in the passage which you read, and that is that the language says nothing about whether it was meant that Indians and non-Indians would fish at the same place at the same time or on the same run or whatever. This is not spelled out. I can only conclude that when the Indians received — demanded and received assurances they could continue to use their usual and accustomed places which were not included in the reserved ground. They understood they would use them as they had before without non-Indians being on the same spot.

For example, if they were constructing a weir with privately owned dip net locations built on to it, that they would not have those weirs and those dip nets invaded by whites, or if they were going to a pool or a place in the stream where they normally speared fish, that they would not be confronted or have to fight with whites wanting to fish at the same place at the same time and at the same spot.

I think what was happening, and I think I said this quite clearly in my report, is that the Indians understood that they retained full rights to their usual and accustomed fisheries, wherever these may be, but that as owners of these rights, in the native way of looking at things, they were extending use rights to

the non-Indians to share in the resources, but I don't think they were giving up anything, or that they thought they were giving up anything.

(R1870 line 15 - 1876 line 14)

Q. Do you believe that Captain Jack was capable of explaining the terms of the treaty in Chinook jargon to the Indians?

A. Oh, in a general way. I believe the terms of the treaty could be explained in Chinook jargon. As to the legal entailments of the language in the treaties, I do not believe this could be conveyed in the jargon. I believe I am in complete concurrence with Dr. Riley in that portion of his direct testimony in which he said, I believe it was his direct testimony, in which he said that if all parties had spoken fluent Makah or fluent English, there still would have been problems in communicating the meaning of the language of the treaty, because people were operating from two different approaches with different kinds of understandings about property rights, et cetera, and this woud make for difficulties at least in that area, and certainly in others, and I find myself in complete agreement with Dr. Riley on it at that point.

I might say that apparently this room is filled mostly with people who all are fluent English speakers, and many of whom have legal training, and I gather they are still trying to arrive at a common understanding of what the language in the treaty contains.

(R1886 line 11 - 1887 line 11)

Q. Is there any evidence that would give you a clue as to understanding why the term "usual and accustomed stations" was used?

A. The only evidence that I can cite on is the fact that Indians were concerned to retain their fishing sites,

the fishing rights, their ownership over the fishery resource that they were concerned with, and so in response to their expressed concerns by people at almost every treaty for which we have records, and unfortunately we are not told anything about what the Indians might have said at the Medicine Creek Treaty in the official proceedings of that first treaty, but in all of the subsequent treaties from Point Elliott onward, and especially as we go onward at the treaty of Point No Point, the Treaty with the Makahs, the treaty on the Chehalis River, Indian after Indian is cited as speaking to the — securing of and the retaining of their rights to fisheries and all of them speak of it in terms of this being the thing they are most concerned with.

Not one of the Indians is quoted in the official proceedings as asking for anything in the way of agricultural implements, teachers, or anything else. All they keep talking about is their fisheries.

Q. Okay. I believe we are wander a little bit away from my question. As far as you are concerned who drafted the treaty language of this article 3 that appears in these treaties?

A. The fishing clause language?

Q. Yes.

A. I can't be positive, but I believe that it was George Gibbs. My reasons for saying so are that in a document which he prepared in March of 1854 which is earlier in the year before the Medicine Creek Treaty first was negotiated, he set out similar language in a report to Governor Stevens in which he was proposing the kind of things which should be taken care of in the treaty.

Q. Now, is it your understanding that as far as in the negotiations, that the representatives of the government approached the Indians with drafted treaties; in other words, was the language in this clause negotiated language, to your knowledge, or had it been drafted?

A. It had already — Gibbs had already seen the necessity for putting such a clause — I believe it was Gibbs. I think it is highly probable he was not the only one, as I have indicated in my boundary report, who made that concern known as a necessary component of the treaty, but the heads the various clauses in their rough form were drafted before any meeting, any formal meeting upon a treaty ground with Indians.

The Medicine Creek Treaty was drafted just a little bit ahead of the meeting with the tribes that were party to that treaty, and I think the language of the clauses may have been adjusted on the treaty ground after discussion of the Indians, but we are not given clear evidence one way or another on that.

Q. In any event, the usual and accustomed fishing ground language was the language that appeared early in the 1850s and appeard in the subsequent treaty, and was not likely the result —

A. No, the actual words, "usual and accustomed" I am not certain was in the March report. I think it was something like, oh, "their fishing grounds must be secured to them," or something like this. "Their fisheries must be secured," I am not positive that the usual and accustomed phrase appears that early.

I assume that that is — I may be incorrect here. I just assume it is a legal sort of a phrase or phrase that a lawyer might use, and I assume that Gibbs, being a lawyer, perhaps contributed to the phrase, and that is just conjecture.

Q. Could we assume that Mr. Gibbs or whoever drafted his treaty would have used those terms in their common pilance as they-were used in 1855 by English speaking people?

A. That is certainly a possibility.

Q. Is it a high probability that they used it in those terms?

A. I don't really know, Mr. McGimpsey.

THE COURT: Well, on that point, I meant to ask, do you agree that insofar as the representatives of the United States were concerned, it would be perfectly reasonable and permissible in interpreting the English language, according to its dictionary meaning in English, unless there was some different meaning 100 years ago, which of course, is possible. Do you agree with that proposition?

THE WITNESS: Yes, of course.

THE COURT: For example, I am sure you must have noted that that clause is in the disjunctive. It says, "Usual and accustomed places,"' and I would assume that we should get down the dictionary, or if necessary get one that was extant in 1855 and get the definition of "accustomed" but certainly I would think at a minimum it would exclude the casual and unusual or exceptional place where some Indian en route some place or other happened to fish, but I may be wrong about that; but I'm using this for the purpose of illustrating the point that the interpretation of ordinary English words in these treaties, as concerns the intent and purpose of the English speaking white man who drafted these treaties, it is perfectly legitimate right now.

The converse here: I ask you as a professional in your field, anthropology, would an anthropologist consider that it was admissible to take the dictionary meaning of English words as they may have been in 1855 and apply it to the understanding of Indians of what the words of the —

THE WITNESS: Yes, the difficulty, of course, is that we don't know how this was interpreted to the Indians.

THE COURT: Well, it seems to me, since there is more evidence that any of the Indians spoke or understood English, that we would be straining things to take a modern English understanding of these words in English and assume that that was under-

stood by thee non-English people, speaking, but I am exploring what mental processes I have to go through —

THE WITNESS: Yes.

(R1946 line 4 - 1948 line 5)

Q. Why is it that you are better able from the evidence to interpret from an anthropological interpretation of what the term "in common with" meant than you were with the term "usual and accustomed"?

A. Simply because I am able to bring to bear on that particular question a more adequate knowledge of what Indian practice was with regard to their fisheries and other property rights at that time. So, I have something to work with and, I think, make a fair judgment or form an opinion on some kind of adequate basis as to what the frames of reference were from which they could approach that language; where I don't have the same kinds of situations with the other phrase.

Q. Now, do I understand you correctly that your greater familiarity with the methods used by Indian fishermen to fish allows you to interpret the term "in common with"?

A. No, that is not what I said. If I didn't speak clearly enough, let me explain it right now.

I said I was speaking with reference to a better understanding of the Indian property rights. Not methods, not technology, but notions of use rights, property rights, however you like to phrase that with regard to their fisheries, because I understood their notions of free extension of use rights to friends, neighbors, visitors and so on in no way impeding ownership or title to these rights.

I can with that base see how they could have understood an explanation that the whites would also be fishing with them, not to be a termination in any way of the rights that they conceived that they held to the fisheries.

So, I have something to work with, and I am trying to explain to you very carefully what it is that I am basing my opinion on.

Q. Now, as I understand your opinion, it is that there were distinct property right concepts among the tribes?

A. Yes.

Q. But that user rights were fairly freely offered to other users by particular owners of property?

A. Yes.

Q. And it is in that context that you are better able to interpret the term "in common with"?

A. Yes.

Q. Now, does the term "in common with" then connote to you that the Indians would understand this to be an extension of user rights to places or facilities in which they had property rights?

A. With the understanding that the person who has the property rights has the decision as to who uses what, where and when.

Q. And that is the basis of your determination of "in common with"?

A. Yes. I'm giving you my opinion, yes.

(R1952 line 16 - 1954 line 18)

Q. I take it that the extent of the commercial fisheries in the case area at treaty times was not so extensive so as to threaten the abundance of the resource?

A. It would appear that was the case.

(R2006 lines 12-16)

Q. Dr. Lane, as I understand your testimony, the Indians at treaty times did have property concepts in that particular Indian might have an ownership interest in a fishing site and they would grant user interests to other Indians, is that correct?

A. That's correct.

Q. When you spoke of a primary and secondary right,

would the ownership interest be the primary right you referred to and the user interest the secondary right?

A. No, no, that's not what I referred to.

Q. Would you clarify then the difference between a primary and a secondary right for me?

A. Yes. It is simply that certain people would have stronger rights, if you would like to put it that way, in a resource producing area or any fishing location than other people who had weaker rights but still had rights, and these would, in my view, would be termed as ownership rights in the location. However, they were not of the same degree.

Q. There were varying degrees of ownerships rights, is that your testimony?

A. Yes, as I am using the term.

Q. The distinction between ownership rights and user rights holds up, does it not?

A. Yes, there would be other people who had no claims of ownership, no claims of heirship to a particular location but who might be accorded use rights by the owners.

Q. You drew an analogy yesterday or the day before to yourself and your fence post digger, I believe, a post hole digger, as to that being analogous to the type of ownership user relationship on fishing rights, is that right?

A. Yes.

Q. Now, did it ever occur that two or more Indians might have this type of an ownership interest in a particular fishing site?

A. Which type of interest?

Q. Well, in your analogy, the type of interest that would be analogous to your owning the fence hole digger?

A. Yes, if I understand what you are asking me.

Q. In other words, you and another person could have bought a fence hole digger and owned it in common, right?

A. I perhaps didn't speak properly the other day. My husband and I own the post hole digger.

Q. You and your husband own the post hole digger, but you could have had common ownership interest in it?

A. Yes.

Q. And there you would still extend use rights to other Indians?

A. Yes, correct.

Q. As far as fishing sites, were there other —

A. I think there were analogous situations.

Q. That occurred?

A. Yes.

Q. Is that situation analogous then to what we call in common law a tenancy in common?

A. I don't know.

Q. If your ownership interest in that fence hole digger with your husband were, under the law of Canada, a tenancy in common in that you each had undivided equal interest in it, would that be analogous to what two Indians might have in a particular fishing site if they had an ownership?

A. I'm sorry, I can't answer that because I don't know what an undivided interest or these other terms may entail.

Q. Well, without worrying about what the actual legal connotation is of an undivided interest, if you and your husband have each an equal interest to the post hole digger, is that the type of interest that each of those two Indians would have in my hypothetical question?

A. Yes, you could have a situation like that, yes. I see now.

Q. Now, in the treaty, the use of the term "in common with" could that have been a legal term?

A. Yes, I suppose it could have been.

Q. And as I understand your testimony, Mr. Gibbs was — there is a 90 percent chance that he wrote the treaty or drafted the treaties?

A. Oh, he definitely was one of those who sat at the office in Olympia drafting it, and he was not yet serving as Secretary of the Commission, but I think he was very influential in the drafting, yes.

Q. And he was an attorney, was he not?
A. Yes, he was.
Q. And would it be likely, in your opinion, that some of the language that would be used in the treaty would be legal language?
A. I would assume so.
Q. Now, you also indicated — one other question, could this idea of an undivided ownership interest that you have indicated two Indian fishermen could have, could that idea have been discussed in Chinook jargon?
A. I think so.
Q. Now, you also indicated that with regard to references in the treaty about pasturing horses, cattle, I believe it was, in open and unused areas —
A. Just horses.
Q. Horses in open and unsused areas, that you felt that they were referring there to a situation analogous to the English commons?
A. I'm saying that the only suggestion I'm able to think of in this discussion that occurred at several of the treaties, for example, during the first attempt at making a treaty with the Quinault, Chehalis and Cowlitz and other tribes, some of these people who owned horses at the time discussed this, and I'm speaking now with reference to the individual treaty proceedings, the record of the daily log of the negotiations, and during that week they were talking — one of the concerns was "If we have to move away from our own country to go somewhere on the coast, how will we feed our horses?"

And so the question came up, it came up as, you know, earlier along in some of the treaties on the Sound, and as a matter of fact, I probably should mention this that afterwards in part of the correspondence from Gibbs to Stevens, they realized the original Puyallup and Nisqually Reservations were simply inadequate to provide for the stock, the horses of the Puyallups and the Nisqually, who lived upriver

who had horses at that time. Gibbs said to Stevens, "When we set up a reservation for the Upper Chehalis, we will have to set it up in such a way that there is a place for the horses of Upper Chehalis and the Upper Nisqually and Upper Puyallup Indians."

Q. Now, as far as those Indians where the treaty says they will have equal access, I guess, with whites, in effect, to open and unclaimed lands for their horses —
A. Yes.
Q. This would be the in common with type of arrangement, would it not, that we have referred to?
A. The reason that I made the suggestion that this may be a plausible explanation was because — and I can't think exactly where just now, I believe it was Gibbs, or perhaps it was Stevens, who writes this won't create a problem because they don't imagine these areas will become places taken up by settlers, so there will always be a common ground for the horses to graze.
Q. And that was because the settlers wanted basically to live in the woods?
A. Yes, the edge.
Q. At the edge of the clearing?
A. Yes, at the edge of the clearing, that's correct.
Q. So it would have been contemplated by the parties that these open and unclaimed lands that they were speaking of that were to be used in common by both the Indians and whites?
A. This explanation appears in the correspondence somewhere, and that's why I mentioned, that's the only clue I could find to explain what they might have had in mind.
Q. Was there not a similar type of concept with regard to fishing locations in that it was understood that the settlers were not likely to use fishing locations that were being traditionally used by the tribe?
A. No, I think not, in point of fact, there were already settlers trying to use locations which had been

important fishing sites, so I think definitely no.

(R2024 lines 2 - 2030 line 25)

A. When I spoke of cooperative enterprise I referred to the fact that the reef net owner had to rely on the help of many other people to construct the weir and handle the gear. Boulders had to be brought in chukanut to serve as anchors. Men had to work on building the different parts of the net which were then put together, so it would be in proper condition before it was placed in the location. Many men had to be hired on as crew, and these might be relatives, and might also include people who were not relatives and might include people who were co-owners, and even those who were not in any way owners of the site, and the work of many women was required to dry the catch, because many fish were caught at one time, and numbers of them would come together at the reef net locations and work cooperatively in order to take advantage of the opportunity to take huge amounts of fish at one time.

This in no way conflicts with the fact that specific locations were inherited and privately owned in family lines.

Q. Of course, there was a sharing then of the catch among all these who participated in this cooperative enterprise?

A. Yes.

Q. Then, of course, they must have had well-developed concepts of joint effort producing joint benefits, mustn't they?

A. Yes.

Q. Isn't that quite consistent then with the terminology in the treaty that the right to take fish at the usual and accustomed stations would be in common with other citizens of the territory?

A. I don't think there is any relationship between the two sets of statements.

Q. You don't think that merely to say "in common with a certain other type of citizen," isn't also another form of joint effort, Dr. Lane?

A. No, I think you are placing two things in one context that are unrelated.

Q. Certainly, Dr. Lane, if they would have a catch in common after these efforts that would entail sharing, would it not?

A. I am sorry.

Q. Well, maybe I can rephrase the question. Certainly in the method of cooperative enterprise, as you refer to it on page 15 in reef netting, implied a concept of sharing, didn't it?

If Indian four, five, six and seven went on to locations owned by Indian Number One, or maybe one and two, they still understood they were going to share, didn't they?

A. Let me explain.

Q. May I have a direct answer? Doesn't that imply that they could share?

A. The only people who could share, Mr. Rhea, are the people who were hired on as crew and working on the gear, or people who had ownership rights in it and could come and collect a share by virtue of inherited ownership.

Q. I'll accept that point, but still, nonetheless, as between those people or as among those people, and I believe one place in your report on in your authority you say that the crews were ten at least in number, isn't that correct?

A. The size of the crews would vary.

Q. All right. Now, nonetheless, they would be ten or fourteen in size, that would not be uncommon would it?

A. I think not.

Q. Very well. Now, you have just said in this sentence that you gave instead of ayes or no answer, you stated that they would go on there and then share, isn't that correct?

A. Yes.
Q. All right. Doesn't that imply then an ethnic consciousness, if you will, of a theory of sharing? If you don't want ethnic consciousness, let's say then doesn't that imply the existence in the minds of those individuals of a concept of sharing?
A. Of sharing results of their labor, yes.
Q. All right. A sharing of results obtained by labor, would you agree with that?
A. Yes, or by virtue of inheritance.
Q. No, I'm not speaking of inheritance at this point, I'm confining my line of inquiry to ownership by effort.
A. I merely wanted it clear to you that not all the people who shared worked on the gear.
Q. I'll accept that, but I still say the fact remains say fourteen that worked on it or sixteen or eighteen if they worked on that, they shared, did they not?
A. Yes.
Q. And I would ask you again, that does indicate then a consciousness in their minds of the idea of a division of the result of certain efforts, does it not?
A. Yes.
Q. All right. So then doesn't that also reveal a state of mind that would be compatible with the notion that the whites — I mean the Indians and the non-Indians would share the waters of Puget Sound together, which is really the substance of the wording of the treaty?
A. I don't think there is any question but that the Indian people who were parties to the treaties were agreeing to share the waters of the Sound with non-Indian fishermen. I don't think there is any question about that.
Q. Then you think that is what the meaning of the words "in common with" really were put in the treaty for, is that correct?
A. Yes, I do.

(R2044 line 2 - 2049 line 3)

Testimony of CARROLL L. RILEY,
Defendants' Expert Anthropological Witness

June 29, 1973
September, 1973

Q. Would you tell us your educational background?
A. Yes. I attended Southwest Missouri State in 1940-41, 1945-46 concentrating in chemistry and classics. In 1946-48 I attended the University of New Mexico, majoring in anthropology and minoring in history. I graduated from that university in 1948 with an Honors A.B. I attended the University of California from 1948-49, graduating from there in 1950 with an M.A. in anthropology. Then from 1949-52 I attended the University of New Mexico graduating from that university in 1952 with a Ph.D. in anthropology.
Q. You have a doctorate in anthropology?
A. That is correct.

(1974 TR 388 line 32 - 389 line 11 (Ex D1))

Q. Have you done any teaching in anthropology?
A. Yes.
Q. What has been your academic experience?
A. I was an instructor at the University of Colorado in 1953-54. From 1954-55 I served as an Assistant Professor at the University of North Carolina; from 1955-60 as an Assistant Professor at Southern Illinois University, Carbondale; from 1960-67 Associate Professor at Southern Illinois University, Carbondale; 1967 to present Professor at Southern Illinois. In 1970 I also became Museum Curator of Anthropology at Southern Illinois University, and in 1972, Director of the University Museum at Southern Illinois University, Carbondale.

(1974 TR 389 line 33 - 390 line 12 (Ex D1))

Q. You mentioned, Doctor, doing some field work in

Western Washington in 1952, 1954, 1956, and 1966 for the Federal Government. Could you tell us what agency of the Federal Government that was?

A. Yes. It was the United States Department of Justice.

Q. What was the purpose of your field work?

A. I was requested to serve as a researcher on a series of Indian claims for compensation before the Indian Claims Commission, testifying particularly on group identity, economic and political organization on a series of present day Western Washington tribes.

Q. What groups did you study at that time?

A. I originally was asked to study the groups around the Puget Sound (Squaxin, Nisqually, Puyallup, Duwamish, Suquamish, Snohomish, Snoqualmie, and Skykomish, Skagit, Samish, Duwahah, Lummi, and Nooksack).

Q. Did you study other groups of Indians also?

A. Subsequently, I was asked by the Federal Government to research and report on the Skokomish and Clallam, Makah, Quinault, and Quileute and (I believe at still a later date) the Cowlitz.

(1974 TR 393 lines 12-32 (Ex D1))

Q. Dr. Riley, do you have any opinion as to what may have been the Indians' concern that the treaties assured them the right to take fish at their usual and accustomed stations?

A. This, I think, was covered in my direct report. Certainly one concern was simply the concern that they have enough to eat, and that they be protected in this right, this basic human right, to have enough to eat in a period when they saw impingement of settlers increasingly on their land.

Q. Were there any other —

A. — by "their lands" I mean Western Washington Territory generally.

Q. Were there any other reasons that they might have thought to have been secured of their right to take fish at their usual and accustomed stations other than their own sustenance of food?

A. Dr. Lane discussed at some length the commercial uses in this area as far as Indian fisheries are concerned. The data on that, I think, are somewhat mixed. There unquestionably, however, was Indian trade all through the area, and certainly trade was one of the factors.

(R2172 lines 3-24)

Q. Do you have an opinion from your studies on what the parties understood by the term "in common with" in the treaty clauses as that concerned fishing?

A. Well, again I have always assumed that to be a legal term for the reasons I gave before in the "usual and accustomed" in my layman's knowledge of the legal term "in common with" based on my own holding of property and holding of property in common with people, it means pretty much what it means in common English parlance. It is a sharing, it is to be shared and to be shared without the idea of division.

(R2180 lines 5-17)

Q. Yes, you understood it correctly. Now, if I were to say to you that you could continue to go to the places where you had commonly gone, my question is in two parts.

Would that connote to you that you could go there with other people, or that you could go there as you usually had?

A. I don't believe that the first connotation would necessarily follow at all. I believe that the second one would be the one I would —

THE COURT: I don't think you are answering the question. Repeat it now again, please.

Q. If I said that you were permitted to continue to go to places or a place where you had commonly gone, as between the two alternatives I give you, which is the more probable connotation, that you could go there in common with others, or as you usually have gone there?

A. Phrased as you have phrased it, sir, it would surely be the second.

(R2185 lines 3-21)

Q. Next statement:

"During the negotiations which led to the signing of the treaties, the tribal leaders expressed great concern over their right to continue to resort to their fishing places and hunting grounds."

Based upon the evidence which you have examined, in your opinion as an anthropologist, do you agree or disagree?

A. Among the Makah and the Meninick meetings — let me answer no, and then let me expand.

Among the Makah and the Meninick meetings, there is some worry about fishing grounds among the Clallam and Skokomish that the treaty of Point No Point — there is some concern about whites moving into the areas, and also about rivalry between the Skokomish and the Clallams and the fact that they did not get along very well.

Generally speaking, there was not expressed, at any rate, in the minutes of the meetings, which are all in evidence, a great concern over fisheries, except in terms of general statements, like he wanted to hunt and fish and to take fish at accustomed places, et cetera. This is — do you understand my phraseology, not the phraseology of the documents?

Q. Yes. And the two examples you gave were in the Clallam Treaty and the Makah Treaty. Do you know of any other examples that you can recall where there

was anything approaching or appearing to be an assurance of the kind that we are speaking of here — I'm sorry — and expressed concern about the Indians?

A. There may well have been expressed concern in the Medicine Creek and in the Point Elliott treaties. You were asking me of the intensity of this concern?

Q. No, I'm just asking you whether it was ever expressed, to your knowledge.

A. It was expressed, yes.

Q. Is there any treaty involved in this case, and I can name them for you, if you like, where that concern was not expressed, to your knowledge?

A. I would have to re-read the treaties. Perhaps if you would name them —

Q. The Treaty of Medicine Creek.

A. In the Treaty of Medicine Creek there was no concern.

Q. There was no concern expressed?

A. Right.

Q. And the Treaty of Point No Point?

A. In the Treaty of Point No Point, there were concerns expressed, but as I have said, that the context of the expression is the Clallam coming into Makah — I'm sorry, coming into — let me rephrase that.

It was Clallam coming into Skokomish, into Hood Canal, Skokomish, and some worry there would be warfare, or at least there would be trouble of some sort, and there was also some worry about the whites coming into the area.

At one point the Skokomish Indians suggested that they share the whole thing with the whites, and one of the Treaty Commissioners said no, that wouldn't work, the whites would soon take over everything, and it would be better for them to have a reservation where they could be protected.

Q. The Treaty of Point Elliott.
A. I was talking of Point No Point.
Q. I'm asking you now about the Treaty of Point Elliott.
A. I don't remember any specifically.
Q. The treaty with the Quinaults.
A. Again, I don't remember any specifically.
Q. The treaty of Neah Bay.
A. We discussed that, haven't we? That is the treaty of the Makah. In that a number of people expressed the desire to fish and expressed the desire to take whale on the shores, and Stevens says, as I recall, fishing with the whites, and they finally said yes. That was certainly one of the kinds of — there were certainly expressions on the part of the Indians of some concern.
Q. The treaty with the Yakima?
A. I have never read the treaty with the Yakima.
Q. Have you read any of the documents describing the negotiations leading up to the treaty with the Yakima?
A. No. I really do not know anything about the Yakima, anything that is not correct. Of course, I know a little about the Yakimas, but nothing to answer your question.
Q. Do you know whether the Indian speeches or speech communication at the negotiations at the Treaty of Medicine Creek is recorded anywhere?
A. The Treaty itself or the negotiations or both?
Q. The communication of speech by the Indians negotiating for the Treaty of Medicine Creek.
A. To the best of my knowledge, it is not. I know of no place.
Q. The next statement, speaking of the tribes or their predecessors involved in this case, and the time of the treaties and the signing and negotiation of them, "they were reluctant to sign the treaties until given assurances that they could continue to go to such

places," that meaning their fishing places and hunting grounds, and take fish and game there.

Do you agree or disagree?

A. Yes, that seems to be the thrust of that article in the treaties, which assures Indians their accustomed and — usual and accustomed rights to fishing grounds and hunting and berrying places.
Q. So you agree with that?
A. That the Indians were worried about it, oh, yes.
Q. I'm talking about the statement, do you agree or disagree?
A. I'm sorry, would you rephrase the statement? I think I agree with you.

THE COURT: Read the statement again.

Q. (By Mr. Pierson) "They were reluctant to sign the treaties until given assurances that they could continue to go to such places and take fish and game there."
A. I'm not sure we can draw that conclusion there from the various treaty documents. These treaties had people who were reluctant to go places because they alleged — they proposed — they were really developed later on, they weren't alleged, that closed reservations were on salt water, and some of them were upriver. There was a reluctance, as I pointed out to you a few moments ago, of groups that were not friendly to each other settling in the same area, and the like.

It is very difficult to say to what degree of reluctance the Indians had, they seemed to be very cheerful in signing these treaties at the end.

There was discussed for a day or two, certainly this was a factor.

Q. Is there any other material besides the minutes of the treaty negotiations upon which you would rely in stating whether you agree or disagree with that statement?

A. The minutes of the treaty certainly are the primary materials. There is, of course, the discussion in Swan of the abortive treaty that Governor Stevens tried to sign, and that was part of my answer.

There are discussions by Hazard Stevens, who was a boy at the time, who was the son of Governor Stevens. There were discussions by people like Ezra Meeker, an old time settler, who was rather critical of the — of some of the treaty provisions, particularly the inability of the treaty people to understand the upriver and downriver so-called stick Indians and the Indians on the bays and inlets.

There was an account of Gibbs, the '77 account of Gibbs.

Q. And you draw upon these sources in determining whether to agree or disagree with the statement I read to you?

A. I draw on those sources, yes.

THE COURT: I think all you have said, however, is that you are not sure that you can agree. Maybe that is just a figure of speech, but did that adequately express your thought?

THE WITNESS: Yes, I believe Mr. Pierson said was that a major issue, and I said well, it was an issue but I'm not sure it was a major issue. There were a number of issues.

Q. (By Mr. Pierson) My question was. Dr. Riley, whether it is possible for you to draw on all the background and resources which you have had available through your long experience in this area to agree or disagree with that statement.

THE COURT: And to that, as I recall you said that you are not sure that you can agree, and does that express your thought and understanding of the matter as best you can put it?

THE WITNESS: I suppose the record will express it, but you might read the statement again, if you wish.

Q. (By Mr. Pierson) Certainly. "They," being the Indians, "were reluctant to sign the treaties until given assurances that they could continue to go to such places and take fish and game there."

A. Yes, they were reluctant to sign the treaties in some cases. The Treaty of Chehalis was not signed at all. The reason they were reluctant to sign, that had nothing to do with fisheries as near as I can figure out from the extant evidence, it was that the Indians downriver did not want to live with the Indians upriver.

The other treaties, they were not in fact reluctant to sign, in fact they were very eager to sign, and the treaty documents bear this out, this is with great authority, if the speeches of various of the leaders who did sign, telling how good their hearts were to the whites, and I think this was one of the factors that they took into account in signing those treaties.

I think they were very canny people, given their cultural lives, but I think there were other factors, and I really don't know, and I don't think that there is anything in the treaty documents and in the literature of that period that gives any indication of those factors except the Chehalis Treaty, which was in fact, not signed at all.

Q. Dr. Riley, I want you to listen to another series of statements, and let's assume that this is an accurate recitation of the written description of what happened in the negotiations with the treaty at Point No Point.

The Indians were concerned —

THE COURT: Excuse me, do you understand that you are required now to assume that this is an accurate thing?

THE WITNESS: I do, sir.

THE COURT: Then you express an opinion based on that assumption.

THE WITNESS: Yes, sir.

Q. (By Mr. Pierson) "The Indian parties to the treaty of Point No Point were concerned with possible loss of their sources of food — 'berries, deer and salmon.' The first to speak said in part: 'I wish to speak my mind as to selling the land. Great Chief, what shall we eat if we do so? Our only food is berries, deer and salmon — where then shall we find these? I don't want to sign away all my land, take half of it, and let us keep the rest. I am afraid that I shall become destitute and parish for want of food.'

"After the Indians had been assured that the reservation would be only a place at which they must make their homes, the Indians discussed the proposal among themselves, and on the following day assented to the Treaty. At that time one of the tribes said: "My heart is good. I am happy since I have heard the paper rea , and since I have understood Governor Stevens, particularly since I have been told that I could look for food where I pleased and not in one place only.' "

The description continues later on:

" 'We are willing to go up the canal since we know we can fish elsewhere — We shall only leave there to get salmon, and when done fishing will return to our houses."

Are you familiar with that description?

A. Yes.

Q. And does hearing that refresh your recollection as to whether you can agree to the statement about the assurances given in any of the treaties involved in this case?

A. Well —

THE COURT: The question is, is your memory refreshed by this?

THE WITNESS: Yes, my memory is refreshed. That is my answer to your question, my memory is

refreshed. Now may I expand on that? That of course, is a part of the treaty, and I was trying to talk to the treaty as a whole, and I don't question that the Indians were interested in having salmon — having rights to take salmon on Hood Canal and in the river. If that is a question, I say yes, of course.

Q. The question was —

THE COURT: And I take it then in connection with the statement you made a few moments ago that their joy, their readiness to sign the treaties was predicated on the proposition that they had been guaranteed these very rights that we are speaking of, right?

THE WITNESS: I think this was a factor. I think there was several other factors, and one that has not even been touched on here is the fact that Americans were moving into this area and the Indians were in fact worried about being pushed off the lands, so to speak.

Q. Were they worried about being pushed out of their usual and accustomed fishing sites?

A. That may also be.

Q. In your opinion as an anthropologist, was it so?

A. In my opinion as an anthropologist, that was so.

Q. All right, now, you said that the quote I gave you was part of the treaty. You don't mean part of the terms?

A. Part of the treaty documents. I think that is what you referred to earlier.

Q. All right, now the last statement I would like to read to you is — and this is in the context of assurances given and concern expressed regarding continuation of fishing at usual and accustomed places:

"The official records of the treaty negotiations prepared by the United States representatives reflect this concern and also the assurances given to the Indians on this point as inducement for their acceptance of the treaties."

Now would you agree or disagree with that

statement as descriptive of negotiations and signing of the treaties involved in this case?

A. Yes, would you read that once more? I may be getting a little tired, but I kind of missed that first sentence.

Q. (Reading)

> "The official records of the treaty negotiations prepared by the United States representatives reflect this concern and also the assurances given to the Indians on this point as inducement for their acceptance of the treaties."

A. I think that is one of the inducements.

Q. Well, do you agree or disagree with the statement?

A. Do I agree or disagree witht he statement? I agree with the statement and I qualify it by saying that that was an inducement.

(R2352 line 14 - 2365 line 2)

A. Oh, I see. I am sorry. All right. On the lower portion of page 25, after the quote from Starling, Indian Agent,

> "There is no record of the Chinook jargon phrase actually used in the treaty negotiation."
>
> I think that has been taken up since. There certainly is one, and I believe that that was corrected in the treaty of Point Elliott. There is a page or two of Chinook jargon with the English translations. That is not the treaty, but the treaty negotiations.

Q. Yes, and that Chinook jargon phrase which is translated into English does not describe any of the terms of the treaty fishing rights provisions we are about in this case, does it?

A. That is correct.

Q. So to the extent that sentence says there is no record of the Chinook jargon phrase, the right of taking fish at all usual and accustomed grounds and stations is further secured, there is no record of the Chinook

jargon phrase used for that language. Is that a correct statement?

A. Excuse me, sir. What — the statement you have made is correct, and let me read you the statement that I objected to.

Q. All right.

A. (Reading)

> "There is no record of the Chinook jargon phrase actually used in the treaty negotiation."
>
> Now —

Q. And that statement, Dr. Riley, under the heading of "B" "Meaning of 'the right of taking fish, at all usual and accustomed grounds and stations, is further secured' "

A. That is correct, sir.

Q. And do you know of any place in the negotiation literature or informant testimony or historical reconstruction where you have seen the Chinook jargon used to translate that phrase?

A. I have not. If by that phrase you mean the phrase on taking a fish —

(R2372 line 15 - 2374 line 7)

Q. Then all you have to say is, "Yes, I am correct."

A. Yes.

Q. Now, where else do you disagree?

A. It's really the same kind of disagreement. At the bottom of page 27, there is, in the last paragraph the statement:

> "In my view, the most likely Indian interpretation of the 'in common' language would be that non-Indians were to be allowed to fish without interfering with continued pursuit of traditional Indian fishing. I think it most likely that the government intended for non-Indian participation in fishing."

Q. I'm sorry, Dr. Riley. You missed two words, "* * * intended to provide for * * *"

A. I'm sorry.

> "* * * provide for non-Indian participation in fishing with no thought that this would require any restriction of Indian fishing."

I do, in fact, agree with that, and I agree with it perhaps for different reasons than Dr. Lane, and I will — at least, one different reason from Dr. Lane.

It is my feeling, my belief, that as of 1855 the number of Indians was so small — in fact, even the number of settlers was so small — that there was no vision on the part of the treaty commissioners about the possible necessity of restricting the fisheries.

This is brought out in one of the plaintiffs' exhibits, the exchange of letters between Stevens and Fowler in 1856, when Stevens was interested in getting rights or developing commercial fisheries.

Stevens, as comes through rather clearly in most of these documents was, in fact, very interested in the Indians. He asked Fowler if the Indians would suffer if this kind of white commercial fishery — large-scale fishery, were to be started in this area.

Fowler's answer, as I recall — and I don't have the document with me at this moment — was "No, in our time," a very interesting phrase, "In our time, no."

Q. Dr. Riley, are you aware of any conflict between Indians and non-Indians concerning fishing at any of the Indians' principal or usual places of fishing prior to the treaty?

A. Prior to the treaty? Prior to 1855?

Q. Yes.

A. There is the account of Hitchcock and the Makah on a date of about 1850. To what extent that was a dispute over fisheries, a dispute over the land that Mr. Hitchcock was using, or both, I don't know. But there certainly was that.

I imagine there were others. At the moment, I cannot think of them.

Q. And is it your understanding as an anthropologist that one of the purposes of the treaty fishing rights clause was resolved to protect against such conflicts?

A. It is my belief that the government was attempting to protect the Indians in fishing in their usual and accustomed places and protect them against whites, but allow them to fish in common with whites.

Q. And in protecting and allowing that in common fishing, it was intended to resolve the conflicts that existed between Indians and non-Indians?

A. This is not stated in any of the treaty documents, per se. There are accounts, scattered accounts of it, a number of accounts of it in the R.C.I.A. documents, and there obviously were problems.

Dr. Lane has documented some of them or has discussed some of them.

It is my belief that Governor Stevens hoped to resolve these. I would say that they were not resolved because of splits — "split" really is not a good word — because of the different emphases and different areas of control of the Indian agents and the state and the Federal Governments, the territorial or Federal Governments.

Q. What I'm trying to get at, Dr. Riley, is whether it was the intention of the government treaty commissioners by thus protecting the Indians to resolve the conflicts which had previously existed, to their knowledge between non-Indians and Indians regarding fishing?

A. My answer is yes, with the understanding that they were trying to protect both Indians and citizens.

Q. And what were they trying to protect the citizens from?

A. They were trying to make sure that the citizens received their fair share of the fisheries, if you wish. In common with, if it means nothing else, must be taken to mean that.

Q. Why do you say that?

A. Well, would you expound on that just a little?

Q. It's a very simple question. You made a statement that in common with means, or must be interpreted to mean —

A. I'll give you a simple answer, then. It's my opinion.

Q. What is it based upon?

A. It's based on a whole series of things, actually. It's based on the number of complaints of the citizens, of which you have people like Swan in his early book articulating. You have people like Swan and Riley, which Dr. Lane pointed out yesterday, in the Puyallup case. You have people like Hitchcock who was quite perturbed and angry as to his inability to establish a Makah fishery.

I am sure there are others. These occur to me at the moment.

You also have the report of the treaty documents themselves. You also have the 1855 report of Stevens, which is largely Gibbs' railroad report.

The 1854 report of Stevens contains a section on which he gives his philosophy of Indian life. He wants to turn them into good citizens, educate them, make them into agriculturalists, blend them with the people.

He is concerned, very concerned, about the Donation Act, very worried about it. He points out that the Donation Act has opened up land that has not as yet been treatied for, and this is bound to create problems.

Manypenny to Stevens, in the documents I just mentioned, treaty documents, brings up the same point.

Q. What else do you base your opinion on?

A. Do you want more?

Q. I want all you have, Dr. Riley.

A. I'm giving you a series. I'm sure there are more, but I would say that if you asked me to completely document every statement I would have to go over the records. If you wish, I will.

Q. To your recollection, Dr. Riley, in light of these things that you have just cited to us, or any of your other experiences, have you come across a statement by anybody contemporaneous with the negotiation and signing of these treaties which says in common with was intended to grant to the non-Indians a fair share?

A. I know of no such statement.

(R2381 line 2 - 2386 line 11)

A. Let me say one more thing about that. Musn't we make a distinction about a precise legal definition and a definition that people will understand? What I think I was saying to you is that it is my belief that the language in Chinook jargon could have been understood in layman's terms.

I do not think, as Dr. Lane does not think, it could have been understood in legal terms.

But the Indian has been subjected — and I'm talking only about Western Washington Indians — the Indian has been subjected throughout the United States to an Indian policy that began before the signing of the Washington treaties which had has its intent making him into a citizen.

Governor Stevens indicates that for Western Washington, and it is certainly no secret. It is talked of again and again in various parts of the country, making him into a citizen, educating him, and if he wasn't a farmer, making him a farmer, making him, as Col. Simmons suggested in 1858, and as other people have suggested at other times for other areas, take the little children and take them away to school and do not let them see their parents, and do not let them speak their language. Make them speak English.

This was the policy of the United States.

(R2453 line 22 - 2454 line 14)

Q. For example, if I wanted to help this Court understand the words that were used and I wanted to look at a dictionary, look at a dictionary, a list of words that were commonly used in Chinook jargon around this area, around 1855, 1856, 1857, around those times, to find out whether "usual" was in the dictionary, whether "accustomed" was in the dictionary, whether "citizens" was in that dictionary, whether "territory" was in the dictionary, what would be my best source? What would be the thing I should go and look to which would be of assistance to this court and bring forth and put it in evidence here?

A. We are talking about 1973?

Q. No, I'm talking about a contemporary document around this time, a contemporary dictionary.

A. I would think Gibbs.

(R2460 line 10 - 2461 line 13)

Testimony of THOR C. TOLLEFSON
Director, Washington State Department
of Fisheries

July 9, 1973—August 29, 1973

Q. Mr. Tollefson, are you presently the director of the Washington State Department of Fisheries?

A. Yes.

Q. How long have you held such position?

A. Since May 1, 1965.

(1974 TR, 424 lines 17-21)

Q. Are you familiar with the operation of the International Pacific Salmon Fisheries Commission?

A. The Commission was created pursuant to a treaty between the United States and Canada. It manages the Fraser River stocks of sockeye and pink salmon. It is composed of three Canadian and three United States citizens. I am one of the latter, having served for eight years, and am currently the Chairman of the Commission.

Q. Would you describe briefly the management functions of the International Pacific Salmon Fisheries Commission?

A. The treaty and protocol provide that the Commission must manage the stocks of salmon I referred to above in such a manner as to (1) provide adequate escapement for spawning purposes, and (2) divide the catch as equally as possible between the two countries. Over the years the catches of each country have come close to matching the catches of the other. A more complete statement can be found in the Joint Biological Statement at pp. 101-103.

Q. In your opinion, has the Commission been able to successfully manage the Fraser River pink and sockeye runs on the basis of a percentage share of the harvest divided between the United States and Canada?

A. Yes. The annual reports of the Commission over the years have indicated that this has been the case.

(TR 1974 430 lines 4-26)

Q. Could your department perform its statutory duties if the management of the salmon resources in Puget Sound and on the coastal rivers involved in this lawsuit were fragmented between the department and the Indian tribes?

A. Jurisdiction to manage fisheries, or any resource, must reside in one agency to be successful. Divided jurisdiction means no jurisdiction, really. I don't remember what court in effect made that statement, but experience suggests that this is clearly true. If Indian tribes attempt to regulate the same off-reservation areas that the court has said we have jurisdiction to regulate there will be continued conflict between the tribes and the department and the resource will suffer.

(1974 TR 431 lines 9-20)

Q. Did you have any role in the establishment of International Pacific Salmon Fisheries Commission?

A. No. It went back way beyond my time.

Q. Do you have any knowledge of whatever as to how they decided to have the equal shares?

A. Well, just from reading the literature, originally the sockeye and pinks coming through U.S. waters, like coming on the south side of the Straits or passing through the San Juan Islands up by Point Roberts, were cropped more heavily by the U.S. than by the Canadians. This disturbed the Canadians because they considered these fish their fish, wholly spawned within their waters.

So, they began negotiating with the United States to get an equitable division of the fish. They thought at that time that they, at least, ought to have half, and they would have been happy to get them.

Then there was a tremendous slide in what we call the Hellsgate area that blocked the fish from going up and almost decimated the fish destined for the upper reaches of the Frazer River. So, it became very necessary for something to be done there to restore the stocks.

The U.S. had more money than Canada. So, they solicited us to enter a treaty with them under which we would make fish passages available while we would go 50/50 on the cost and then divide the fish 50/50 as nearly as possible in the course of the agreement itself.

Q. So, the United States put in some money and guaranteed a 50 percent share.

A. Correct.

(R692 line 14 - R693 line 21)

A. Well, we think we have done a fair job, but one has to recognize that we human beings, Indian, non-Indians and fishermen are the same the world over, they all want more fish and more fishing time. But we haven't had any great problems, except perhaps on the Puyallup River in the last couple of years.

Since we launched on our program of providing Indians with special fishing rights the last couple of years, they have not abided by our regulations, and we haven't bothered them simply because this case has been pending.

(R708 lines 5-15)

Q. Director Tollefson, can Indians fish anywhere in the State of Washington without a license in the normal fishing season set by the Department for all citizens?

A. Yes, they can, in the areas that are open to other fishermen.

(R721 lines 4-9)

Testimony of CALVIN PETERS
September 10, 1973

CALVIN PETERS, called as a witness by and on behalf of the plaintiff Squaxin Island Tribes, being first duly sworn, was examined and testified as follows:

(R2482 lines 8-11)

Q. Do your tribal regulations, to the extent that they regulate your off-reservation areas, cover these areas where your tribe, you believe, has usual and accustomed fishing grounds?
A. I believe that it covers a portion of it.
Q. And what portion doesn't it cover?
A. This is my own conclusion, but I believe, you know,

that we have these fishing rights to fish in Western Washington, in the Puget Sound —
Q. In your own mind it would be anyplace in Western Washington?
A. Yes, because I personally have commercially fished from the Coast up in the Straits and out on the ocean myself.
Q. And when you commercially fished in that manner, was it your own boat?
A. Yes, it was.
Q. And how large a crew did you have?
A. There was just myself, or sometimes I took my sons with me.

(R2489 lines 6-24)

Q. Do any of your other tribal members fish commercially with either gill nets or seine nets in the regular commercial season fisheries?
A. Yes, we do.
Q. And how many of your members do that, do you know?
A. Offhand, I couldn't say, but I know of two families, two members of a family that does this.
Q. And would they follow the fish up to Alaska?
A. Yes, they do.

(R2498 lines 12-21)

Testimony of HILIARY IRVING
September 10, 1973

Q. Mr. Irving, are you a Makah Indian?
A. Yes. I'm a full blooded Makah Indian.
Q. Where do you live?
A. Neah Bay, Washington.
Q. And is that the reservation of the Makah people?

A. That's the main village of the Makah Nation, yes.

(R2519 lines 3-8)

Q. And when you say the halibut fishery has been regulated virtually — when you say the halibut fishery has been curtailed considerably, who was it curtailed by?
A. By the International Halibut Commission.
Q. So it wasn't State curtailment, was it?
A. No, sir.

(R2564 lines 1-7)

Testimony of JOSEPH ANDREWS

September 10, 1973

JOSEPH ANDREWS, called as a witness by and on behalf of the United States and Skokomish Tribe, being first duly sworn, was examined and testified as follows:

(R2589 lines 20-23)

Q. Do these fishermen that fish commercially in your tribe have other occupations?
A. Yes, most of my people are loggers.
Q. And so then their commercial fishing is mainly to supplement their income?
A. Well, income plus the food.

(R2600 lines 2-7)

Q. And you indicated before that many of your members are employed in logging, is that the same major occupation of these members that live on the reservation?
A. That's right.
Q. What other occupations could they be in?
A. Oh, they farm.

Q. Other than farming and logging?
A. Well, I myself am a surveyor. I survey.
Q. And for all of them fishing is a part time occupation?
A. Yes.
Q. And you fish for food and to supplement your income, is that correct?
A. Food and kind of a privilege that we have. Like I got relief out of fishing, it seems to ease my tensions or keeps me away from the world. I enjoy it.
Q. And this is when you are sport fishing?
A. Yes.

(R2602 lines 5-24)

Q. Are you aware of any current Skokomish religious practices that surround the steelhead? Does it have any significance in a religious context to you?
A. I know at one time that we had the festivals there, but we don't practice them anymore.

THE COURT: When you were a boy?

THE WITNESS: Yes, when I was a boy it was practiced.

THE COURT: And it had to do with steelhead?

THE WITNESS: Steelhead, yes.

Q. These ceremonies no longer occur today; is that correct?
A. Not that I know of.

(R2608 line 16 - 2609 line 4)

Testimony of BILL FRANK, JR.,
Tribal Witness

September 10, 1973

BILL FRANK, JR., called as a witness on behalf of the United States and the Nisqually Tribe, plaintiffs herein, being duly sworn, was examined and testified as follows:

(R2620 lines 13-17)

Q. Mr. Frank, have you ever had any of your gear confiscated by enforcement officers of the state?
A. Yes, both by the State Game and Fisheries Department.
Q. And what type of property was taken?
A. I have had boats, motors, nets, taken.
Q. Was there anything else taken in connection with this?
A. No. Oh, I have had fish taken along with the nets.
Q. Have you ever been notified of any judicial proceeding at which any of that property was to be declared confiscated or forfeited?

(R2623 lines 6-15)

Q. (By Mr. Dysart) Mr. Frank, have you ever been notified of any judicial proceedings in which any of the property that has been seized from you was to be declared confiscated or forfeited?
A. No.
Q. Has any of the property ever been returned to you?
A. No.
Q. And how long has this problem existed?

(R2628 lines 5-12)

A. The ones that I identified, some of them were torn, and I can't completely tell you how — until if I had spread them out on the ground and looked them all over. But they were torn and the ropes were cut, and they were put in a gunnysack.
Q. From your experience, at times when you have been present when nets have been seized by the Department of Game, can you tell us the manner of seizure?
A. They have at one time on the back of their pickup trucks or whatever, they have thrown grappling hooks into the gillnets and torn them out of the river.

And they have went up there with their jet boats, they have taken them and cut them off. I don't think at one time I have ever seen them where the knot was easy to pull to untie it, they had taken their knives and cut them, they cut all my anchors off.

If they happened to be snagged, they could cut the snag part out of the nets so that they could confiscate what part they would get out of the river.

Q. Now you say that you had property seized in December of '71 and January and February of '72; were you arrested or charged with any offense in connection with that?

MR. CONIFF: Objection, your honor.

THE WITNESS: No.

THE WITNESS: It would be in the month of December of 1971, and into January and February of 1972, sir.

Q. (By Mr. Dysart) Now, Mr. Frank, have you ever seen any of your gear in a warehouse or other property of the Washington Department of Game?
A. Yes. It wasn't in the warehouse, it was in Olympia at the Department of Game outside of the warehouse, outside of the Department of Game in Olympia. It was kind of on a parking lot or something.
Q. What was the occasion for you seeing that?
A. We were there to identify my gear — all my gear that they had confiscated.
Q. Did you recognize some of the gear that was there as being yours?
A. All I could recognize was my boat and my motor, and all I could recognize at that time was the four gillnets.
Q. Now, were there additional gillnets in the items that were shown to you?
A. I believe there was about twenty or so.
Q. Were those nets identified as to where they had been seized by the Department of Game?
A. Some of them were and some of them wasn't.

Q. What condition were they in?

MR. CONIFF: We are moving into the area of the witness' next testimony, the bottom of page 9 over to page 10.

Here again he is discussing other pending lawsuits involving other individuals making statements.

THE COURT: He is just speaking of himself, had he ever been charged with any offense, is what the question was. And your answer was what?

THE WITNESS: My answer is no sir.

(R2629 line 2 - R2631 line 9)

Q. (By Mr. Dysart) Have officers of the Fisheries Department ever taken any of your gear, to your knowledge?

A. Yes.

Q. And has any of that gear ever been returned to you?

A. No.

Q. Has there ever been a judicial declaration of confiscation or forfeiture with respect to that?

MR. MCGIMPSEY: Objection, not within his competency to know whether there has ever been.

THE COURT: Well, not to his knowledge, that's the extent to which he can speak.

MR. MCGIMPSEY: I agree that he can testify that he received no notice of a forfeiture, but whether there has been one --

THE COURT: I see what you mean. The only part of his answer that is in the record here is that he has no knowledge of any judicial proceedings with respect of his gear.

Q. (By Mr. Dysart) Is that a correct characterization of your testimony, Mr. Frank?

A. Yes.

(R2633 lines 2-22)

Q. If we could stay with Mr. Mills for a moment.

Isn't it true that Mr. Mills does claim and exercise, claim treaty fishing rights on the Nisqually River in the Franks Landing area?

A. Mr. Mills is exercising his rights.

Q. If I understand you correctly, then a person can acquire treaty fishing rights by marriage into the Nisqually Tribe.

A. An Indian person.

Q. For example, Mr. Mills, whom I believe has claimed at least, that he is part Yakima, part Warm Springs, and he being married to your niece, would then be in a position to claim these rights; is that correct?

A. Yes.

Q. Are you and Mr. Mills close personal friends?

A. Yes.

(R2662 lines 1-15)

Q. Does Mr. Ted Kover that you mentioned before in the fish committee, is he on the Nisqually roll, the 1965 roll?

A. No, his wife is.

Q. Is Mr. Kover a Nisqually Indian?

A. No.

Q. And yet he is operating on the Nisqually Fish Committee and is a Nisqually fisherman or claims Nisqually fishing rights?

A. Yes, he is exercising his wife's rights as a Nisqually Indian.

Q. Is Mr. Kover an Indian?

A. Yes.

Q. What tribe?

A. I believe he's from Colville.

(R2666 lines 3-17)

Testimony of BENJAMIN RUBEN WRIGHT
September 11, 1973

BENJAMIN RUBEN WRIGHT, called as a witness on behalf of the United States and the Puyallup Tribe, plaintiffs herein, being first duly sworn, was examined and testified as follows:

(R2869 lines 3-7)

Q. Are you a member of the Puyallup Indian Tribe?
A. Yes, I am; enrollment number 288 of the 1929 enrollment.

(R2869 lines 19-21)

Q. Are you a commercial fisherman?
A. I am right now, temporarily.
Q. And what is your other employment, besides fishing?
A. I have worked six years with the Employment Security Department, State of Washington, as an interviewer, and my job description was Community Worker.
Q. And what is your status with that agency at the present time?
A. Starting July 1 of this year I am on one-year annual leave, and I am expecting to hopefully go to work for the Puyallup Tribe as a probation and parole officer.
Q. What program is that particular position organized under?
A. It's the — money comes from the Law and Justice from the U.S. Government. The Puyallup Tribe is going to be the contractor for the two positions.
Q. And what will be your principal responsibilities in that position?
A. Helping the offender to rehabilitate.

(R2870 lines 5-23)

Q. Members of your tribe in your experience and in your knowledge about the white fishermen at work on purse seine boats, do you share with them a common goal to make a livelihood or earn money from your commercial fishing?
A. Yes.
Q. And would you say your interest is just the same as their interest then, as far as the commercial aspects of your fishing goes?
A. I guess so, yes.

(R2895 lines 16-25)

Testimony of CHRIS PENN
September 12, 1973

CHRIS PENN, called as a witness on behalf of the United States and the Quileute Tribe, having been first duly sworn, was examined and testified as follows:

(R3190 lines 10-13)

Q. Where do you live, Mr. Penn?
A. I live on the Quileute Reservation, and the name of the town is Lapush, Washington.
Q. Are you a member of the tribe?
A. Yes, I am.

(R3190 line 25 - 3190 line 4)

Q. Tell us what kind of fishing the Quileute people do today.
A. Well, we have a gillnet in our rivers, and we also have six boats that are owned by our tribal members offshore fishing. It is mostly gillnet in the river.

(R3191 line 22 - 3192 line 2)

Q. Now, is it possible for your fishermen to fish for a living all within the boundary of the reservation, or is it necessary to go outside the reservation for fishing?
A. We have to go outside the reservation to fish.
Q. Why is that?
A. Well, on account of the rivers on the bottom where we fish on the reservation, is not suitable for drift net, for instance, drift net there is only one or two places on the reservation that you can — we have to go outside to accommodate all our fishermen.
Q. About how many members are there in the Quileute Tribe?
A. 460 on the rolls.
Q. About how many of these 460 people depend on fish in some way or another; either for livelihood or food?
A. It goes by the head of the family. There is 34 fishermen.
Q. You mean the 34 fishermen feed their own family, or they feed all 460 people?
A. No, they feed their own family.
Q. How about the other people who are not related to fishermen, are they in any way involved with fish?
A. No.
Q. Do they eat fish?
A. Yes.
Q. Is the fish distributed free as gifts?
A. In certain times — certain times of the year, of our ceremonies, yes.
Q. In what kind of ceremonies are fish used?
A. We have Quileute Days, and in parties, birthday parties mostly, and they have a ceremony that we use a lot of fish, is given Indian names to each family.
Q. Is fishing important to the Quileute people?
A. Yes, it is.
Q. In what way?

A. Well, that is the only way, that is the only resource that we have, of making any money on the reservation.
Q. Do your people make a distinction between salmon and steelhead?
A. No.
Q. What is the steelhead as far as you are concerned?
A. Fishes, they are all the same, in our fishes. It is still fish, steelhead and the silver and king are all the same. We use it the same way as anything else.

(R3192 line 10 - R3194 line 10)

Q. They have been just taking everybody's nets?
A. Yes.
Q. Have you ever had any of your taken?
A. Yes, I have had some.
Q. How many nets have you lost?
A. I have lost three so far.
Q. Now, do you know every time you set a net outside the boundaries of the reservation after, say, November 20th of the year, that the Game Department is going to take that net?
A. Not November 20, no.
Q. When is that?
A. December 1.
Q. Now, do you know that the Game Department is going to take that net if they find it?
A. Yes. We know they are going to take it.
Q. Why, then, do you continue to re-set the net?
A. To protect our treaty rights.
Q. Has the Game Department ever contacted you to find out if you own those nets?
A. Yes, they have. They came down to LaPush. I can't name the exact date. They came down and offered to give us our nets back, but we was working on the dock at the time. This was during the summertime. They

took the nets back. They parked in front of the store and waited there, and that's as far as they came. We couldn't get off work to go up and get our nets.

Q. Where were you working?
A. I was working at LaPush Fish Company at the time.
Q. They offered to give the nets back to you?
A. Yes. But we didn't get to go up there.
Q. Have you ever taken them up on their offer after that?
A. No. I have never heard from them any more.
Q. Have they ever offered to return any other nets that they have taken besides that one?
A. No.
Q. Do they still have your nets?
A. Yes, they have.
Q. Nets of other Quileute fishermen also?
A. Yes.

(R3197 line 1 - R3198 line 16)

Q. How far out?
A. Anywhere between 20 fathoms all the way out to the forties. About five miles.
Q. Five miles out?
A. Yes.
Q. Are most of the trollers out in that area?
A. Yes, there is.
Q. I take it there aren't very many trollers, then, inside?
A. Well, they're inside, yes.
Q. Why is it that your are trolling out at five miles?
A. That's where the fish are.
Q. Is that pretty true up and down the coast?
A. Yes, it is.

(R3208 lines 1-15)

Testimony of JOE DE LA CRUZ
September 13, 1973

Q. Mr. De La Cruz, are you an enrolled Quinault Indian?
A. Yes, sir.
Q. How long have you lived on the Quinault reservation?
A. I have been on the Quinault reservation approximately twenty-six years. I left the reservation during the time I was in the service and the time when I was in school for ten years.
Q. Are you the chairman of the Quinault business committee?
A. Yes.

(R3474 lines 12-20)

Q. Let's just explore that for a little bit.

In your experience fishing on the ocean is most of the fishing being done outside the three-mile limit?

A. I'll say a great majority of it, at least off the Quinault Reservation and Grays Harbor, a great majority of the fish are picked up beyond that three-mile limit. I know certain times of the year when water temperatures are right and they run in closer into shore within that three-mile limit, which is normal in late July or August when the fish do move in. But this year I have been out there only a few times, the fish have been out there 15, 20 miles and even beyond that almost the total summer.

(R3505 lines 11-25)

Testimony of LENA COLTEE HILLAIRE
September 10, 1973

Q. Did the Puyallup Indians have any programs for distributing fish to members of the tribe who couldn't

fish themselves, like older people or people who couldn't fish?

A. Yes, they always did.

Q. How was that done?

A. Well, we would appoint somebody to do that, and then they would get the fish for the elders, and the olden days, and they would even clean them for the old people.

They used to get them all clean, ready to take around to the elders, yes.

Q. They would distribute them around to —

A. Yes.

Q. — all members of the tribe?

A. Yes, on fish and clams and ducks and things like that, any of our Indian food was gotten for our old people. I helped when I was a little girl. I helped at Nisqually and Puyallup.

Well, I helped other reservations, too, when I would go, mamma would go to visit, you know.

Q. Coming back to the seine for a moment, do you have any estimate that you could give us and tell us how long this seine was? Was it longer than this room?

A. Oh, yes, the rope would come about where you are. It is how much slack we had in the rope. Then they would go around. That is quite a ways, because — and then they would come to shore with the ends of the seine, that is the net.

Then they would start pulling and they would have a little canoe that they called det-wick on that side, and just bat the water with their paddles to keep the fish from getting out until the slack of the rope come in, and when the rope was in they didn't worry no more.

Then they start hauling the fish. Oh, those days, they were the fishing days, not now, but those days were.

And then they would scoop all the little fishes out, the women, throw them so they, you know, keep on going, I guess, wherever they were going. Oh, it was a lot of fun for me.

THE COURT: Kind of fun for you to think about it, isn't it?

THE WITNESS: Yes, oh, I know the history of way back, because I never knew English, you know. I had to go to school to learn English. I used to ride with a dairy woman, and finally mama moved right across to Puyallup school, and then I would go to holler to her to bring me a canoe. I didn't like it in school. They punished me.

I didn't read the pictures, you know, all right. Seven of us, we used to get put in the clothes room, and then we would dance the Indian dance and we would talk Indian and we would just have a high old time.

MR. DYSART: That is all I have.

THE COURT: Anything further for plaintiffs?

THE WITNESS: And then, you know, before when the Indians, before their seasons they get fish and the Indian doctors name the fish and everything. Then we would burn it so that we could have a good run for the next year. We had a lot of Indian traditions, and they worked, too, on the Indian. I do that yet. I burn stuff, you know, when I want anything done. I still follow my Indian life.

I eat a lot of Indian food, but I got no more. All the white people took all our food. We have got nothing in the woods now, not even Indian medicine. Yes, that is true. I never take white man's medicine. Always Indian. And I have been physical — I have my physical examination and everything. I don't get sick, but I get hurt now.

See, I got hurt, yes.

MR. DYSART: Thank you.

(R2681 line 5 - R2684 line 5)

Testimony of FORREST L. KINLEY,
Tribal Witness
September 12, 1973

Q. Mr. Kinley, are you a member of the Lummi Tribe?
A. Yes.
Q. And where do you reside?
A. Lummi Reservation.
Q. Do you have any official position within the Lummi Tribe at this time?
A. Assistant to the chairman.
Q. And in years past have you occupied a position within the tribal government?
A. Yes, I was chairman and member of the council for approximately 20 years.
Q. Have you ever worked in fishing for a livelihood?
A. Since I was around 12 years old.
Q. And will you tell us briefly what kind of fisheries you have worked in?
A. I have fished — I have fished every type of fisheries there is. I started out gillnetting in the Nooksack River. I have reef netted. I have beach seined. I have my own purse seine boat. I have gillnetted commercially on the outside and gillnetted within the reservation it elf, so that I have had experience in all types of fisheries.

(R3004 line 25 - 3005 line 22)

Q. (By Mr. Ziontz) Now, with respect to the Game Department , has the Lummi Tribe ever tried to reach an accommodation with the Game Department?
A. I think that any tribe in the State of Washington would say that there is no Indian tribe in the State of Washington that has gotten any cooperation out of the Game Department.

During Eisenhower's administration, I happened to be one Indian that was appointed with Newton Edwards who was assistant Secretary of the Interior, to come out here and talk to Game, Mr. Biggs and one other head they had at that time. I just don't recall, Biggs and —

Q. Mr. Biggs was the Director of the Game Department?
A. Yes. The other man was in enforcement. I think he's still on.
Q. Is that Mr. Neubrech?
A. Neubrech.

We met with them and their staff, and they didn't want to cooperate with the United States Government. They didn't want to cooperate with the Lummi Indians.

Also, during the time that I was in tribal government, we requested a meeting with the Game Department to come up and make some concessions on the Nooksack River that we have always considererd steelhead as a salmon, and we still do.

We recommended to the Game Commission that we would make a 72 hour closure during their season if they would take a one day closure, and that we could not even let them take a one day closure.

We told them to name their own day. If one fish got away, we felt that this would help the steelhead run in the Nooksack River.

I think that the statistics of the State of Washington would prove that we have maintained a steelhead run in the Nooksack River without any help from the state, and that the Nooksack River has showed a good, even run of coho salmon, and, you know, without too much support from the state.

I think that the Lummi Tribe can stand on their own track record of conservation in the Nooksack River by the state's own records.

Q. In what way is the tribe, the tribal fisheries hurt by state action at this time?

A. Well, I was for maybe twenty years on the tribal council as a council member and head of various committees and things like this.

For years I have attempted to get the state to put in their regulations, just a very small thing, to define the boundary of their fishing area, so that it don't include Lummi reservation.

This would make the enforcement for both the state and the Lummi Tribe a lot easier, and there wouldn't be no conflict and things like this.

Up to this day, we have never been able to get the state to include this in their regulations.

The other thing is that at the present time they have opened Bellingham Bay to a heavy fall Chinook fisheries, which practically eliminates our cuts our Indian fisheries in the Nooksack River down to where the majority of our people will not reap the harvest that we should with the size of runs that have been available to our people.

A few years ago, the pink salmon was on its way down in the Nooksack River. We met with the state and agreed if they would agree to close Bellingham we would agree to take the responsibility for the disappearance of pinks in the Nooksack River.

Well, they did agree to close it down for two years, and we did bring up their pink run back to where it is today.

I think that we have a track record that we can live on that we have regulated our fisheries as Lummi Indians.

(R3017 line 9 - 3020 line 8)

A. I fished throughout Puget Sound purse seining.

(R3074 line 21)

EXHIBITS IN U.S. v. WASHINGTON
(Submitted in 1973)
384 F. Supp 312
(W.D. Wash. 1974)

EXTRACTS
WEBSTER'S ENGLISH DICTIONARY

1828 and 1862 Editions

(Exhibit PL-86)

"Common. 1. Belonging equally to more than one, or to many indefinitely; as, life and sense are common to man and beast; the common privileges of citizens; the common wants of men.

"2. Belonging to the public; having no separate owner. The right to a highway is common.

"3. General; serving for the use of all; as, the common prayer.

"4. Universal; belonging to all as, the earth is said to be the common mother of mankind.

"5. Public; general; frequent; as, common rapport."

REPORT OF GEORGE GIBBS TO CAPTAIN M'CLELLAN ON INDIAN TRIBES IN THE TERRITORY OF WASHINGTON

March 4, 1854

(Exhibit PL-9)

* * *

"It is not believed that extensive reserves would be desirable for these tribes. The nature of their country and

their own habits make the case entirely different from those of the prairie Indians. Although some of them cross the mountains in search of buffalo, they are not generally hunters; nor is their country any longer a game country. They require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found, and of grazing their horses and cattle at large; but they do not need the exclusive use of any considerable districts. A large portion of their territory will, in all human probability, never be occupied by white men; and so far nature has provided reserves. What is necessary for them, and just in itself, is, that small tracts of good land should be set apart as permanent abodes, where they may raise their vegetables and bury their dead, secure that they will not be driven off at the pleasure of the first corner.

"This is especially so, because their main resource during a portion of the year is speedily destroyed in the neighborhood of settlements. A drove of hogs belonging to one white man will consume the winter provision of a tribe of Indians. In like manner, the use of their customary fisheries, and free pasturage for their stock on unenclosed lands, should be secured.

"The subject of the right of fishery, in its present position, is believed to be one concerning which difficulties may arise. It is certain that the intention of Congress never was that the Indians should be excluded from them; but as no condition to this effect was inserted in the donation act, the question has been started whether persons taking claims, including such fisheries, do not possess the right of monopolizing them. It is, therefore, proper that this also should be set at rest by law."

P.27

DOCUMENTS RELATING TO THE TREATY OF DECEMBER 26, 1854 WITH THE NISQUALLY, PUYALLUP AND OTHER INDIANS

(Exhibit PL-10)

Report of James Doty, Secretary to the Treaty Commission, December 26, 1854:

> "At an evening session of the Commission, all the members being present, the Treaty was very fully discussed, and also the provisions necessary to be incorporated in the further Treaties to be concluded with Indians upon the Sound and Coast.
> * * *
> It was also thought necessary to allow them to fish at all accustomed places since this would not in any manner interfere with the rights of citizens, and was necessary for the Indians to obtain a subsistence."

REPORT BY ISAAC I. STEVENS GOVERNOR AND SUPERINTENDENT OF INDIAN AFFAIRS TO THE COMMISSIONER OF INDIAN AFFAIRS

September 16, 1854

(Vol. 746, Executive Documents of the Senate, 33rd Congress, 2nd Sess., 1854-55)

(Exhibit PL-47)

"The subject of the right of fisheries is one upon which legislation is demanded. It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries; but, as no condition to this effect was inserted in the donation act, the question has been raised whether persons taking claims, including such fisheries, do not possess the right of monopolizing. It is therefore desirable that this question should be set at rest by law."

P.456

LETTER FROM GOVERNOR ISAAC STEVENS to GEORGE W. MANYPENNY COMMISSIONER OF INDIAN AFFAIRS

December 30, 1854

(Exhibit PL-11)

Office Supdt. Indian Affairs
Olympia, Washington Territory
December 30, 1854

Hon. Geo. W. Manypenny
Commissioner of Indian Affairs
Washington D.C.

Sir:

I have the honor herewith to transmit articles of agreement and convention, whereby the Indians at the Head of Puget Sound have ceded their lands, with a record of the proceedings duly certified to by the Secretary, all which I submit for the approval of the Department. I trust that the Treaty may be approved of and ratified by the President and Senate.

Referring to the record of the proceedings it will be seen that Mr. James Doty was appointed Secretary, Mr. George Gibbs, Surveyor, Mr. H. A. Goldsborough Commissioner, and Mr. Benj. F. Shaw Interpreter, and that the Indian agent of the Sound District, Col. M. J. Simmons, was on duty in his appropriate capacity with the commission.

After a full conference with these gentlemen, all versed in Indian affairs, I determined to call the Indians, parties to the above treaty, together on the She-nah-nam, or Medicine Creek, and my views both as to the terms of the treaty, the Indians to be treated with necessarily and the probable reserves are embodied in programs which were made the basis of instructions to these gentlemen in intercourse with the Indians; and which with the forward duly recorded in the proceedings.

* * *

"These reserves have been so selected as not to interfere with existing claims or with the progress of settlement, and yet at such points as will enable Indians to catch salmon, gather roots and holmes, pasture their animals on unclaimed land, and participate heretofore in the labor of the Sound. These rights, with restrictions, are secured in Article 3*d* of the treaty.

* * *

But for a more general view of the conditions of the Indians and the obligations of the government.

The Indians on Puget Sound have been for a considerable time in contact with the whites, have acquired many of their habits and all their vices. They form a very considerable proportion of the trade of the Sound. Many are good laborers and are employed in families, vessels, lumber yards, mills and on farms. They catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it. Whilst they cultivate small patches of potatoes, their principal food in fish and roots and berries.

* * *

"The provisions as to reserves and as to taking fish, pasturing animals, and gathering roots and berries had strict references to their condition as above, to their actual wants and to the part they play and ought hereafter to play in the labor and prosperity of the territory. It may be here observed that their mode of taking fish differs so essentially from that of the whites that it will not interfere with the latter. They catch the salmon with spears in deep water and not with seines or weirs."

TREATY PAPERS TREATY OF POINT ELLIOTT

(Exhibit PL-14)

Address of Governor Stevens to the Indians, January 22, 1855:

* * *

"We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and where you will be able to pass in canoes over the waters of the Sound and catch fish and back to the mountains to get roots and berries."

* * *

DOCUMENTS RELATING TO THE NEGOTIATION OF THE TREATY OF POINT-NO-POINT

January 26, 1855

(Exhibit PL-15)

* * *

"I wish to speak my mind as to selling the land—Great Chief. What shall we eat if we do so? Our only food is berries, deer and salmon. Where then shall we find these? I don't want to sign away all my land. Take half of it and let us keep the rest. I am afraid that I shall become destitute and perish for want of food."

* * *

"Mr. Simmons, the agent, explained that if they kept half their country, they would have to live on it, and would not be allowed to go anywhere else they pleased. That where a small tract alone was left, the privilege was given of going wherever else they pleased to fish and work for the whites. If you can cultivate more land than this, you can have it."

* * *

Governor Stevens proceeded to advise them as follows:

"* * * Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school. Does not a father send his children to school? It gives you mechanics and a doctor to teach and cure you. Is not

that fatherly? This paper secures your fish? Does not a father give food to his children? Besides fish you can hunt, gather roots and berries."

DOCUMENTS RELATING TO THE NEGOTIATIONS OF THE TREATY WITH THE MAKAH INDIANS

January 31, 1855

(Exhibit PL–16(b))

"Kalchote Neah Bay * * * He thought — he ought to have the right to fish and to take whales and get food where he liked. He was afraid that — if he could not take halibut — where he wanted, he would become poor.

* * *

"Gov. Stevens informed them that so far from wishing to stop their fisheries, he wished to send them oil kettles, and fishing apparatus.

* * *

"Gov. Stevens replied that 'he wanted them to fish but that the whites should fish also.' "

JOURNAL OF OPERATIONS OF GOVERNOR STEVENS, TREATING WITH INDIANS EAST OF THE CASCADE MOUNTAINS in WASHINGTON TERRITORY

May 22, 1855

(PL–22)

"The homestead provisions as in the treaties in the Sound was spoken of. That their horses could be allowed to graze in the neighborhood of their reservation on lands unoccupied by whites, and unclaimed.

"They would have the right of travelling throughout the country for lawful business; fishing at accustomed places in common with the whites. And going to the

mountains for berries, always provided that they were to remain upon their reservation when required, and were in no manner to interfere with the whites when off of it."

LETTER FROM GOVERNOR STEVENS
to
CAPTAIN FOWLER, SPECIAL INDIAN AGENT

December 6, 1856

(Exhibit PL–7)

Office Supt. Ind. Affairs
Olympia W.T. Dec. 6, 1856

Capt. E.S. Fowler,
Special Indian Agent
Port Townsend, W.T.

Sir,

I have to request that you will furnish me at the earliest practicable moment with all the information you can collect in regard to the Fisheries of the Sound, Straits and Coast—to what extent they might enter into our commercial operations and made an article of export—the market—the craft best adapted to the business—the best point for a depot on the Sound. The extent the whole business might be developed. The extent to which the labor of the Indians could be availed of. Is there any likelihood that, for some years, the quantity of fish will be diminished as to ~~straighten the Indians~~ interfere with the subsistence of the Indians.

Truly & respectfully,
Isaac I. Stevens
Gov. & Supt.

*Also send me any information of interest you can collect in reference to the early history of the Indians under your charge, their habits, customs, &ct.

REPORT OF AGENT M. T. SIMMONS
to
SUPERINTENDENT GEARY

July 1, 1860

(Exhibit PL–41)

The salmon that run up the Qui-nai-elt river, in great numbers, are considered the fattest and best flavored of any taken on this coast, and the Indians should be encouraged to open a trade in them. I think they can be more profitably employed at present in this way than in agricultural pursuits, as it will be a more congenial employment for them.

P.420

"ON THE INDIANS OF WESTERN WASHINGTON AND NORTHWESTERN OREGON"

A Paper Prepared by
George Gibbs, M.D.

Transmitted to Professor J. W. Powell by Acting Commissioner of Indian Affairs Galpin, October 13, 1876

(Exhibit G-4)

* * * as regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seigniorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the Sound particularly, from one to another locality, according to the season. * * *

REPORT OF SUPERINTENDENT C. H. HALE
to the
COMMISSIONER OF INDIAN AFFAIRS

October 19, 1862

(PL–42)

TREATY OF OLYMPIA—
QUI-NAI-ELTS AND QUIL-LEH-UTES.

This reservation is situated on the Pacific Coast, about eighty miles south of Cape Flattery. It was surveyed, and the lines marked under a contract made by W. W. Miller, esq., during his superintendency. This survey was not executed any too soon for the interests of the government. If some of the other reservations had been early surveyed and properly defined, there would have been a saving to the department of much more than the cost of survey.

* * *

The Indians mostly reside upon the river, and cannot well be removed thence. They are able to procure the principal part of their subsistence from the river with but little exertion, on account of the excellent fishery near its mouth, being one of the best on the coast. The Quinaitl salmon are justly celebrated for their delicacy and superiority. In the spring of the year they are quite abundant, so that with little exertion, especially if provided with suitable fishing nets, and one to direct and instruct them in reference to curing and preparing for market, these Indians might be greatly benefited. I propose to try the experiment next spring, if it be practicable, by giving them all the encouragement in my power to put up all the salmon they can, so that after their wants are provided for, the surplus may be sold for their benefit.

To retain this fishery the claim of a settler was included within the bounds of the reserve. This was done under the direction of the former superintendent, W. W. Miller, esq. I am well satisfied that it was absolutely necessary to do so in order to prevent serious difficulty with these Indians. The claimant, who had taken in good faith, had incurred considerable expense in his preparations for conducting the fishery, but upon the representation of the matter to him by the superintendent he at once relinquished his claim, the assurance being given that the

loss actually sustained by him should be reimbursed. An appropriation for this purpose should at once be made, so that some of the materials which are still on hand may be preserved from waste and be usefully applied.

A BRIEF HISTORY OF THE SALMON FISHING AND CANNING INDUSTRY ON PUGET SOUND

by

Robert Paul Thomas
Department of Economics
University of Washington
Seattle, Washington

May 1, 1973

(Exhibit MLQ-1)

* * *

Hewes estimated that the average Indian salmon capture would have amounted to between 100 and 130 million pounds and that the Northwest Coast Indians would have accounted for about 35 million pounds of this total. It is clear from Chart 7 that the Indian's annual catch did not endanger the salmon population. The Indians harvested fish that were superfluous from the point of view of spawning.

The coming of the White Man did not lead initially to a conflict with the Indian over fishing rights. Nevertheless, the history of White-Indian relations during this period is very important to understanding the current fishing dilemma. The White Man initially was not primarily interested in the salmon fishery, concentrating instead upon agriculture and the exploitation of other natural resources within the Pacific Northwest. The White Man wanted the right to the land, the Indian the guarantee of his right of access to the various fisheries.

A reading of the minutes of the treaty negotiations brings out the point that the Indian valued the land little

but considered fish the basis of his well-being. Indeed the Indian considered fish the basis of his whole culture. Thus the tribes were willing to sell the land for consideration, but insisted that they retain their rights to fish. Given the nature of their economy, this feeling is easy to understand.

* * *

JOINT BIOLOGICAL STATEMENT

May 11, 1973

(Exhibit JX–2a)

This Joint Statement has been prepared by and under the direct supervision of, and has been reviewed by, each of the undersigned. Except as may otherwise be stated in said Statement the facts, opinions and conclusions set forth herein are those to which each of us would testify as an expert witness in the case for which the Joint Statement has been prepared.

J. E. LASATER, Assistant Director
Washington Department of Fisheries

JAMES L. HECKMAN, Manager
Northwest Fisheries Program
Bureau of Sport Fisheries & Wildlife
Fish and Wildlife Service

CLIFFORD J. MILLENBACH
Chief, Fisheries Management
Washington Department of Game

May 14, 1973
Date

PREFACE

This report has been prepared for the purpose of presenting certain basic fisheries information for use in *U.S. v. Washington*, Civil No. 9213, U. S. District Court, Western District of Washington. That action is concerned with the treaty-secured fishing rights of certain Indians. The case is limited to the consideration of those rights as they apply in off-reservation waters of Western Washington exclusive of the Columbia River drainage area and in adjacent offshore waters. The case is concerned primarily with the rights of the Tribes which are parties to that case as they apply to the taking of salmon and steelhead at those Tribes' usual and accustomed fishing places within the aforementioned area (see map p. ii).

Accordingly, this report is limited to a discussion of the salmon and steelhead resources within the U. S. portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed and the offshore water adjacent to those areas (including those fish which are within any of such waters but are native to outside areas). As used in this report (except where the context clearly indicates otherwise) the term "Puget Sound" includes the Strait of Juan de Fuca and all saltwater areas inland therefrom, and all terms and discussions which would otherwise have a broader or more general scope—such as "fishery resource," "anadromous fish," "salmonids," "total catch," "hatcheries," "freshwater areas," etc.—are to be construed as being limited to the aforementioned geographical area and species to which this report is confined. Other terms commonly used in reference to Pacific salmon and steelhead are defined in the glossary.

§2 Management of the Resource

§2.0 Introduction

Fisheries management means maintaining and enhancing the fishery resources and the aquatic environment and establishing controls on the harvest. In this part we will consider fisheries management programs in terms of their objectives, methods of accomplishment, and the activities of various management entities.

§2.1 Management Objectives

2.1.0 Introduction

Fisheries management takes into consideration both the resource itself and the objectives and needs of the societies which control and seek to utilize it. The anadromous fishery resource is both perishable and renewable. Thus, while an over-harvest could imperil its renewability, an under-harvest during the limited time it is available would result in an irreplaceable waste of the resource. Fisheries management seeks to avoid both of these adverse results and to maintain the stocks at a level which will permit the optimum yield from one fish cycle to another. But the "optimum yield" of the different types of fisheries must be considered in broader terms than just the quantity of fish product obtained. Because in today's society fish resources serve broader needs of man than nourishment. The commercial, sport, and Indian fisheries are managed for different use objectives and user interests. Accordingly, the objectives of fisheries management vary in accordance with the purposes and constituency for which the particular fishery is being managed.

Commercial fisheries are managed to achieve a maximum sustained yield in terms of food and economic profit whereas sport fisheries are managed to achieve a maximum sustained recreational experience and a high yield of personal use food and "trophy" product. The Indian tribes have as their primary use objectives the fostering of Indian economic well-being, the preservation of their cultural heritage and way of life, and the provision of a significant element of Indian diet.

2.1.1 Commercial Fisheries Management

Managing the fishery for maximum sustained profit requires, among other things, that the harvest occurs near the time when the available "crop" has attained maximum bulk and quality. These do not necessarily coincide in time and place. Thus the proper time for commercial harvest corresponds most nearly to the relatively brief period of time when the fish are full-grown and returning to or entering their natal stream to spawn. Net fishery seasons permit the efficient taking of mature or nearly mature fish for commercial purposes during this time period only.

2.1.2 Sport Fisheries Management

Managing for maximum sustained recreation requires providing ample opportunities for fishing. Long seasons, economically and geographically accessible waters, and high catches per individual effort all increase recreational yield. Angling is the accepted method of recreational fishing for salmon and steelhead. It involves catching the feeding fish with baited hooks or lures. Generally, salmon are taken in the marine areas and steelhead in freshwater streams.

Feeding and growing salmon in the ocean and Puget Sound are of greatest recreational value because they are vulnerable to sport gear over a long period. On the spawning migration route from their saltwater feeding areas, full-grown salmon are available to anglers for only a short period of time. Feeding activity of these latter fish diminishes or ceases as they complete their saltwater migration. The efficiency of angling gear is then

measurably decreased. In some Puget Sound areas where salmon are in or approaching their natal estuary, the catch rate is commonly one-tenth that of the ocean fishery.

In contrast to salmon, steelhead actively feed throughout their entire spawning migration route and are readily available to sport gear in freshwater areas. They are not generally taken by sport gear in saltwater.

2.1.3 Indian Fisheries Management

Management for Indian objectives is closer to commercial management than to sport inasmuch as pursuit of an economic livelihood and the efficient procurement of a food supply are major purposes. In addition, salmon and steelhead have special significance in the religious, cultural and mores of the Indian people. Because of traditions, treaty provisions, and location of Indian communities, the Indian fisheries are largely place-oriented. Management for Indian fishery objectives must take this factor into consideration.

§2.2 Management Methods

2.2.0 Introduction

Fishery management methods are related to the life history characteristics of the resource discussed in Part I of this report. The life histories of salmon and steelhead are cyclic. The harvest today, particularly with respect to salmon, can occur in a number of locations on their migration and at several phases of their life progression. During a substantial part of this migration and development, fish of different species, races, and river systems are intermingled to both known and unknown extents. These facets of the anadromous salmonid fisheries make the task of management a complex and difficult one—one in which forecasts of constantly changing variables play a key role.

While there are a number of managers and policies governing the management of salmon and steelhead, the methods or techniques employed by each are essentially the same. All managers are faced with a growing demand on the resource coupled with a serious deterioration of the natural

P.47-50

§2.5 Washington Department of Fisheries—Jurisdiction and Management Objectives

The Washington Department of Fisheries is the State agency charged with management of those fish which the State has classified as food fish. It functions in accordance with RCW Chapter 75 and WAC Chapter 220. The objectives of the Department are broadly summarized as follows:

1. To conserve and, where possible, expand the primary fishery resources;
2. To promote optimum use of the fisheries resource by fishermen (commercial, sport, and Indian), the fishing industry, and general public;
3. To encourage harvesting of the sustainable yield of fish in a manner that provides the greatest return to the economy;
4. To develop public understanding of the fishery resource, its environment, and the philosophy governing exploitation of the resource, and to maintain public respect for the law.

The Department of Fisheries manages and regulates the harvest of the salmon resource for each of the three distinctive fisheries discussed earlier—i.e., commercial, sport, and Indian. As previously indicated, the differences in use objectives of these three fisheries dictate that separate management policies be applied to each. These policies have been discussed in *§2.1.*

In addition, it is the position of the Department of Fisheries that because any State regulation of the exercise of the Indian fishing rights secured by Federal treaties must fully respect the rights thus secured, no regulation may be adopted by it regulating the exercise of treaty fishing rights unless such regulation is determined to be necessary for conservation. P.67-68

§3.1 Indian Historical Fisheries

3.1.0 Introduction

The historical Indian fisheries for salmon and steelhead were the crux of the Indian economy in Western

Washington. In their fishery, the Indians used several kinds of devices and gear, including weirs, traps, various configurations of nets, spears, hook and line, and clubs. Variations of each of these devices occurred in different parts of the region. Some of the variation depended on cultural preference and some on adaptations to local conditions such as depth of water, speed of current, rocky or sandy bottom. Weirs, i.e., open-work fences, were built to permit flow of the water, but to divert the fish so that they could be more easily harpooned, netted, or trapped. Some weirs were large enough to permit the construction of catwalks from which to fish. In historical times Indians fished for their own immediate consumption and cured fish by various means of drying and smoking for later use and for trade. The Indians traded or made gifts of fresh or cured fish to the early non-Indian transient visitors and settlers.

The use of the harpoon, hook and line, and most nets was usually an individual effort by a fisherman to supply food for his family during the winter. The use of the weirs and traps and some nets, such as the seine and reef net, was a Tribal or village effort where the catch was divided among those who did the work. In some cases individual families had their own weir. Reef net fishing by the Lummi Indians was conducted differently than most salmon fishing. Fishing locations were owned by members of families who secured their rights through inheritance. Those men, who usually acted as captains of the canoes, chose those who participated in the season's fishing. The men whom they chose each had to furnish the sections of the net, and the share to which each was entitled was in proportion to the net furnished.

Indians today continue to take salmon for commercial, ceremonial, and subsistence purposes within marine waters and certain rivers by a variety of means, including trolling and the use of gill nets and set nets. The Tulalip Indians also operate beach seines on marine waters bordering their reservation and occasionally within the river estuary. The Swinomish Indian Tribe operates two

traps in the marine waters of their reservation. Following are descriptions of the gear used. P.108-109

3.3 The Location of the Salmon Fisheries

3.3.1 Ocean Sport and Commercial Troll Fisheries

The ocean is a vast "mixing" area for salmon from literally hundreds of diverse streams from several geographic locales. Fishermen utilize ocean areas from Central California to Southeastern Alaska in pursuing these salmon. Major commercial and sport fishing areas in the northeast Pacific Ocean are shown in *Figures 49 and 50*, respectively. These figures illustrate that the commercial troller ranges along the entire coast while the sport fishery is limited primarily to the areas where good ports exist. This is, in part, due to the difference in the boats used by these two fisheries. Some commercial fishing vessels have the capability of ranging far from port for several days at a time, while the sport fishermen and some commercial fishermen in small boats must return to port each night. With the introduction of large, high-speed charter boats, however, the range of the sport fishery is being extended.

The range of area and time spent at sea by the commercial troller is somewhat restricted due to resident license requirements, e.g., a Washington resident commercial salmon troller fishing within the 3-mile territorial waters of the State of Oregon or landing his fish in Oregon ports must meet the license requirements of that State. Non-resident licenses are usually more expensive than resident licenses, thereby tending to restrict Washington resident fishermen to Washington ports or Washington coastal waters. Commercial fishing licenses are not required of Indian fishermen in Washington. By mutual agreement with Canada, U.S. fishermen are able to operate in the Canadian territorial waters (3 to 12 miles off coast) as far north as the northern tip of Vancouver Island, while Canadian fishermen may fish in the 3 to 12-mile zone off Washington as far south as the mouth of the

Columbia River. A limited area in the Strait of Juan de Fuca is also open to commercial trolling (*Figure 53*).

P.125-126

3.3.2 The Commercial Gill Net Fishery Within Puget Sound

The economic success of the gill net fleet depends upon its interception of salmon in areas where the fish are reasonably concentrated. The actual area that is fished depends upon the migratory behavior of the species being sought. The general locations which are fished at one time or another during the open fishing periods are shown in *Figure 51*. Depending upon the origin of the species being sought and the expected size of the returning runs, fishing is concentrated in the San Juan Islands area, Point Roberts area, the inner Puget Sound area, etc.

3.3.3 The Commercial Purse Seine Fishery Within Puget Sound

Since 1936, purse seines have been limited mainly to areas of Puget Sound outside the "Initiative 77 line" (*Figure 42*, Sec. 2.3.3), i.e., essentially to the Strait of Juan de Fuca and Strait of Georgia. There are certain exceptions to this. Seines are permitted inside the "77 Line" during August in odd-numbered years. Also, seines are permitted inside the "77 Line" after October 4 of any year to harvest chums. Thus, the purse seining locations shown in *Figure 52* for the inner Puget Sound areas are used mainly for the harvest of chums. In addition, the 1971 legislature further permitted seines to fish inside the "77 Line" from June 10 to July 25—particularly to fish for Lake Washington sockeye. It also gave the Director of Fisheries discretionary authority to permit seines to fish at times and places where existing fisheries cannot feasibly and properly harvest the runs to prevent wastage.

P.126-127

3.3.4 The Commercial Reef Net Fishery Within Puget Sound

Reef nets are a non-mobile type of fishing gear, both physically and legally. The number and location of reef

nets is limited by legislation entirely to northern Puget Sound, particularly in and adjacent to the San Juan Islands and Pt. Roberts. The locations of reef net sites are shown in *Figure 53*. The limited and minor troll fishery within Puget Sound is also shown in this figure.

3.3.5 The Major Puget Sound Marine Sport Fishing Areas

Although sport fishing is permitted the year-round in all areas of Puget Sound, the fishery varies seasonally as to its relative importance and magnitude, depending on the abundance of fish and fishing conditions (*Figure 54*).

3.3.6 The Indian Marine Fisheries

Today only a few Indian Tribes are active in marine fisheries. The Makahs and Quileutes have troll fisheries off the Coast. The Makahs also pursue both troll and gill net fishing in the Strait of Juan de Fuca. The Tulalip and Lummi Indians use gill nets, and in addition the Tulalips use seines, in Puget Sound. The Swinomish Indians operate the only remaining traps in Washington State, westward of their Island reservation. The Squaxin Island Indians conduct gillnet fisheries in the saltwater inlets of the mainland near their reservation.

3.3.7 The Indian River Fisheries

Indian fisheries currently are exercised at the mouths and varying distances upstream from the mouths of coastal and Puget Sound rivers. These include: Nooksack, Skagit, Stillaguamish, Green, Puyallup, White, Nisqually, Skokomish, Sekiu, Hoko, Sooes, Waatch, Ozette, Quillayute, Hoh, Raft, Queets, Quinault, Moclips, and Chehalis Rivers (*Figure 25*).

3.3.8 Freshwater Salmon Sport Fisheries

Sport fishing for salmon occurs in all of the major streams of the coastal and Puget Sound areas. Fishing is generally located in the lower portion of the river mainstems. Most of the systems receive angler use during the fall primarily for chinook and coho, and in some rivers springtime fisheries have developed for spring chinook salmon.

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3.4.8 Distribution of Marine Salmon Catch from Coastal and Puget Sound Streams

Salmon which originate in rivers of Washington are caught in marine sport and commercial fisheries from California to Alaska. Depending upon the species and the river of origin, each adult salmon returning to the river may represent as many as 5 salmon from that river which were caught in marine waters by many different fisheries. Using data gathered from a large number of specific studies conducted by U.S. and Canadian fisheries scientists the migration routes and areas of marine residency of salmon have been determined. Extensive studies either have been or are currently being conducted for different species in varying degrees of intensity for all major watersheds in Washington.

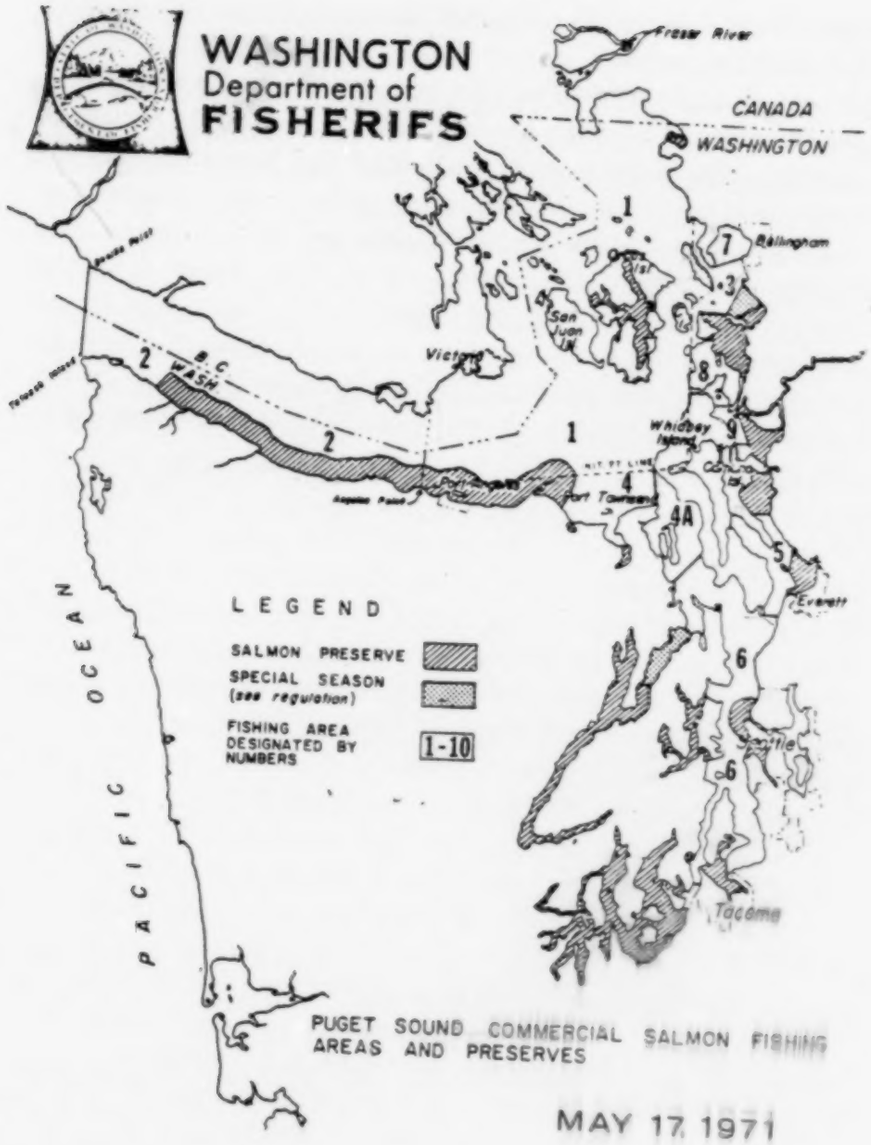
The marine fisheries listed below are those in which significant numbers of coastal and Puget Sound chinook and coho salmon stocks are known to be caught. Other sport and commercial fisheries located along the California, Oregon, British Columbia, and Alaska coasts also take these stocks. Usually the most significant numbers of pink, chum, and sockeye salmon are caught in the net fisheries of Puget Sound.

1. British Columbia commercial ocean troll fishery
2. Washington commercial ocean troll fishery
3. Georgia Strait Canadian marine sport fishery
4. Washington ocean sport fishery (sport areas 1-6)
5. British Columbia Strait of Juan de Fuca net fishery
6. Washington outer Puget Sound (commercial areas 1 and 2 net fishery)
7. Washington inner Puget Sound (commercial areas 3-10) net fishery
8. Washington inner Puget Sound (sport areas 7-12) sport fishery
9. Indian marine fishery

The largest number of coastal and Puget Sound chinook and coho salmon stocks is consistently taken in the Canadian commercial troll fishery off the west coast of

Vancouver Island. The largest catch of Puget Sound pink and sockeye salmon occurs in the "Convention Waters" of the strait of Juan de Fuca by both the Canadian and U.S. net fisheries. Although limited data are available for chum salmon, this information indicates the most significant catch occurs in the Washington inner Puget Sound net fishery. An exception is the Nisqually River chum salmon stocks on which the most significant fishery is the Nisqually River Indian net fishery. The only significant marine harvest which occurs on coastal salmon stocks is by the ocean commercial troll and sport fisheries. Most of the harvest of coastal pink, chum, and sockeye stocks occurs in the rivers.

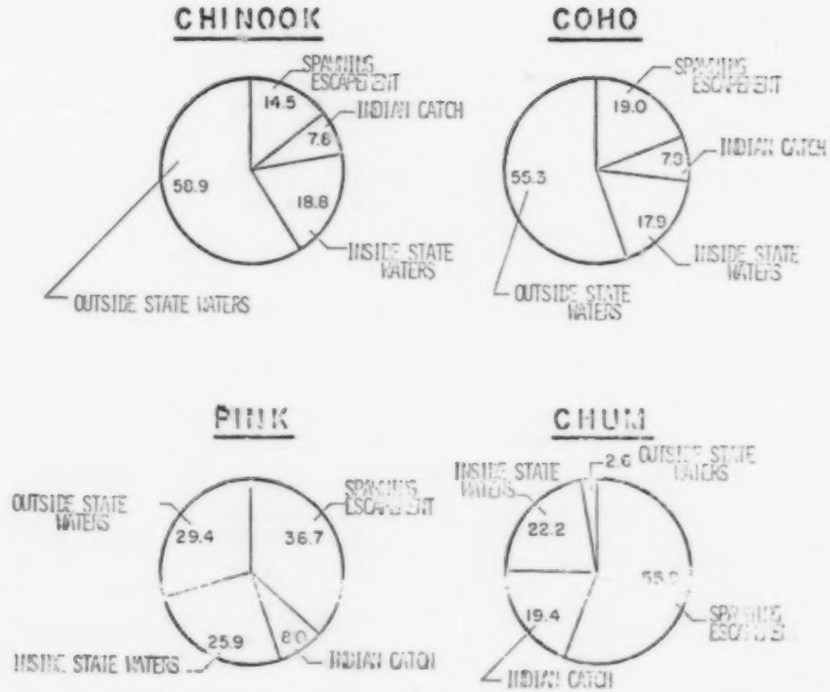
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AVERAGE ANNUAL SALMON CATCH AND ESCAPEMENT FOR SEVERAL RIVERS ON WHICH TREATY INDIAN FISHERIES OCCUR IN PUGET SOUND AND COASTAL AREAS

1965-1970

(Exhibit F-7)



NUMBER AND PERCENTAGE OF SALMON ORIGINATING IN PUGET SOUND AND COASTAL RIVERS HARVESTED BY INDIAN FISHERMEN ANNUAL AVERAGE

1965-70

(Exhibit F-70)

River	Percentages				
	Chinook	Coho	Chum	Sockeye	Pink
Nooksack	28.1	64.4	34.5	–	43.1
Skagit	14.8	20.8	10.5	38.0	19.5
Snohomish-Stillaguamish	20.6	14.1	27.4	–	20.6
Lake Washington[1]	0.0	0.0	–	2.5	–
Green	0.0	8.4	0.0	–	–
Puyallup	20.6	11.4	1.5	–	48.5
Nisqually	23.3	21.1	100.0	–	32.4
South Sound	8.3	5.5	3.1	–	–
Skokomish	48.8	52.3	52.8	–	–
Hoko-Sekiu	37.1	34.4	100.0	–	–
Quillayute	83.9	50.8	100.0	–	–
Hoh	75.0	44.0	100.0	–	–

[1]1971 catches only.

River	Numbers				
	Chinook	Coho	Chum	Sockeye	Pink
Nooksack	7,130	21,448	4,465	–	30,823
Skagit	5,751	9,054	1,863	282	66,592
Snohomish-Stillaguamish	4,498	12,706	3,314	–	55,403
Lake Washington[1]	0	0	–	9,000	–
Green	0	4,622	0	–	–
Puyallup	1,625	4,410	247	–	13,107
Nisqually	736	3,574	14,432	–	1,520
South Sound	55	458	577	–	–
Skokomish	5,983	8,656	12,086	–	–
Hoko-Sekiu	138	600	17	–	–
Quillayute	3,417	4,410	234	–	–
Hoh	3,570	2,570	62	–	–

River	Dollar value 1972 All species
Nooksack	$ 213,480.75
Skagit	185,264.00
Snohomish-Stillaguamish	178,313.75
Lake Washington[1]	27,000.00
Green	18,488.00
Puyallup	51,261.75
Nisqually	81,284.00
South Sound	4,690.00
Skokomish	142,798.00
Hoko-Sekiu	3,848.00
Quillayute	52,746.00
Hoh	46,228.00

AFFIDAVIT OF DR. BARBARA LANE, ANTHROPOLOGIST

Relevant Background Description

BARBARA LANE, upon oath, deposes and says:

1. I am an anthropologist. In this capacity I have been retained by the United States and plaintiff-intervenors in the case of *United States v. Washington* (No. 9213, W.D. Wash.) to study, and report on, anthropological subjects relevant to those people in the Territory of Washington who were, or claim now to be, parties or successors to parties to one of the following treaties:

a. Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132;

b. Treaty of Point Elliott, January 22, 1855, 12 Stat. 927;

c. Treaty of Point No Point, January 26, 1855, 12 Stat. 933;

d. Treaty with Makahs, January 31, 1855, 12 Stat. 939; and

e. Treaty of Olympia, July 1, 1855 and January 25, 1856, 12 Stat. 971.

My background is summarized as follows:

Personal Data:

Born Scranton, Pennsylvania, January 5, 1927; age 45; married, three children; U.S. citizen.

Academic Degrees:

A.B. (Anthropology) University of Michigan 1946
M.A. (Anthropology) University of Michigan 1948
Ph.D. (Anthropology) University of Washington 1953

University Teaching:

University of Washington 1950-51
University of Hawaii 1956-57
University of Pittsburgh 1963-64
University of British Columbia 1964-66, 1969 (summer)
University of Victoria 1968 (summer), 1969-70
Western Washington State University 1972-73

Consulting and Research:

British Columbia - British Columbia Attorney General's Office
Alberta - Indian Association of Alberta
Alberta Native Counselling Center
Washington - U.S. Justice Department
(*State v. Moses*, et al.)
Small Tribes Organization of Western Washington
U.S. Justice Department
(*U.S. v. Washington*)

Ethnographic Field Work:

Coast Salish Indians: Cowichan, Saanich, Lummi, Muckleshoot — 1949-52

Athapaskan Indians: Chilcotin — 1950
Melanesians: New Hebrides — 1953-54, 1957-58

Professional Organizations:

American Anthropological Association
Canadian Sociological and Anthropological Association
Sigma Xi

ANTHROPOLIGICAL REPORT
on the
IDENTITY, TREATY STATUS, AND FISHERIES
of the
NISQUALLY TRIBE OF INDIANS

by
Dr. Barbara Lane

(Exhibit-USA 25)

THE ROLE OF FISHING IN NISQUALLY CULTURE

The central role of fish and fishing in Nisqually culture in the years just prior to and subsequent to the

Treaty of Medicine Creek is attested to in a variety of ways by contemporary observers.

Like most of their neighbors in western Washington, the Nisqually held the salmon in special esteem and were concerned to insure that the supply should never fail. To this end, a complex of special rites and observances were performed. In the anthropological literature, this complex of traits is known as The First Salmon Ceremony.

Specific details of the ceremonial complex varied from one group to another but the basic reasons and format were consistent for the Nisqually and most of the other Indians of the coast. The first salmon ceremony was the most important form of animal ceremonialism in the area, a clear reflection of the central importance of salmon in the native economy. The purpose of the ceremony was to welcome the first salmon of the season and to show respect to the salmon in order to ensure an abundance of the species in the local streams. It was thought that if the salmon were not treated properly, they would become offended and cease to return to the stream where they had been improperly attended.

The first salmon taken in a given run were usually handled in a ritual manner. They might be painted with red ochre, were usually cut in an unusual manner, and generally had to be consumed by specific persons, after having been cooked in a prescribed way. The bones were then returned to the stream so that other salmon might follow.

Among the Nisqually, salmon were normally prepared in a variety of ways including boiling. In aboriginal times this was accomplished by a method known as stone boiling. A water-tight container such as a rigid, tightly woven basket lined with pitch or a water-tight box made out of cedar was partly fill. d with water and heated stones lifted from the fire with wooden tongs were placed in the container in order to bring the water to a boil. Among the Nisqually, first-run salmon were not boiled. In his journal of Indian notes dated 1854-55, Gibbs includes the following entry

> The Nisqually Indians like the Chinook, would not sell the first salmon to the whites for fear they would boil them and the others would not come. They associate the Rubus Spectabilis with the fish in the same way as the latter tribe. So the Sklallams took out the heart before selling the fish for fear it should be given to a dog or thrown in the water.

In addition to the prohibition on boiling the first salmon of the season, the Nisqually along with their neighbors restricted other sorts of behavior which might offend the salmon. Curtis (1913:95) mentions the suspension of certain types of games and sports during the salmon spawning season.

> The very common hoop-and-pole game was current in this region. The hoop, about six inches in diameter, was rolled swiftly toward the contestants, who with their spears stood waiting thirty or forty feet away and endeavored to hurl their shafts through it in such a manner that the spear would transfix the turf and hold the hoop. Bows and arrows sometimes took the place of spears. Shooting arrows at a mark was much practised. But none of these contests were held during the salmon spawning season, for the invisible spirits of the salmon, passing through the village on their way up stream, might be struck by a missile and become angered, not to return that way again.

Smith (1940:101) mentions for the Puyallup-Nisqually that the first salmon caught after the building of a large tripod fish trap were eaten at a community feast and had to be cut in a particular manner.

> In part, also, the feast may have been ritualistic for the salmon were cut length-wise, never cross-wise, or "they would get insulted and not come any more".
>
> Among other items, Smith notes that the salmon
>
> > were boiled entire, flesh, entrails, gills and bones, and all had to be finished to the last scrap.

The requirement that every bit of the first salmon be consumed is a recurring feature of the first salmon ceremony throughout the Northwest Coast culture area.

The underlying concern appears to be that no part of the salmon should be improperly disposed of, as, for example, eaten by dogs.

Smith's information that the first salmon were boiled appears to conflict with Gibb's comment that they should not be boiled. It is possible that the two comments refer to different local custom, to different species of salmon, or that custom changed in the seventy odd year interval between the two reports. Whatever the explanation of that particular point, certain conclusions can be drawn.

It is clear that the Nisqually were concerned that the salmon runs should continue in their streams. This concern was manifested by the performance of certain ritual acts on the part of the local community to welcome and honor the salmon. It was also evidenced by the nonperformance of certain activities on the part of individuals in order to avoid offense or injury to the salmon. The latter concern extended to protecting the salmon from unwitting injury on the part of others as demonstrated by the refusal to sell first-run salmon to the whites.

The traditional importance of fish and fishing in aboriginal Nisqually culture is also reflected in the little information preserved to us regarding the astronomical observations of these people.

In his unpublished journal of Indian notes dated 1854-55, Gibbs made some notations regarding the astronomical knowledge of the Nisqually Indians. Gibbs noted the names of three constellations recognized by the Indians and, interestingly, all were identified with fish and fishing.

The first constellation, for which Gibbs did not know a European name, was called in the Nisqually language "edad' and was said to represent a fish weir.

Orion's belt was identified by the Nisqually as three Indians catching small fish in schools. The sword was said to represent the fish.

Pleiades was described as a species of fish with large heads and small tails.

Elsewhere in the same journal Gibbs reported that the Nisqually attribute the northern lights to schools of herring turning up the whites of their bellies.

The foregoing appear to contain the sum total of information recorded by Gibbs on Nisqually astronomical lore. The facts speak for themselves. Nisqually preoccupation with fish and fisheries was projected in their perception of stellar configurations and celestial phenomena.

Additional contemporaneous information on the role of fishing in Nisqually culture at treaty times is available in the fisheries reports of Dr. G. Suckley whose zoological investigations are part of the scientific record of the *Pacific Railroad Reports*. Suckley's work is a pioneer effort to identify and classify fishes of the northwest, particularly the Salmonidae.

His reports include observations on Indian techniques of taking, preparing, and curing of fish as well as Indian statements about salmon characteristics and migration patterns. Suckley was based at Fort Steilacoom intermittently between 1854 and 1856 and much of his data relate specifically to the Indians living around Steilacoom and in the Nisqually watershed. Suckley employed the name Nisqually to include both these groups.

Suckley tentatively identified sixteen species of salmon and salmon-trout for the Columbia River and Puget Sound regions. While he expected that further investigation would reduce the number of species, he thought that the native taxonomic systems erred in the other direction, merging under a single category what must be distinct species.

It is instructive to note that the Nisqually salmon nomenclature as recorded by Suckley circa 1854 makes virtually the same species distinctions as our present scientific classification.

POLITICAL AND ECONOMIC ASPECTS OF INDIAN-WHITE CULTURE CONTACT IN WESTERN WASHINGTON IN THE MID-19TH CENTURY

BY
BARBARA LANE, Ph.D

MAY 10, 1973

(Exhibit USA 20)

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Anthropological Report on the Identity, Treaty Status and Fisheries of the Squaxin Tribe of Indians
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Anthropological Report on the Identity, Treaty Status and Fisheries of the Stillaguamish Indians
Anthropological Report on the Identity, Treaty Status and Fisheries of the Sauk-Suiattle Tribe of Indians
Anthropological Report on the Identity, Treaty Status and Fisheries of the Lummi Tribe of Indians

SUMMARY OF ANTHROPOLOGICAL REPORT IN U.S. v. WASHINGTON

This summary contains two kinds of statements—matters of record and matters of opinion. Documentation on specific tribes is not provided here, but is available in the full report of which this is a summary. Matters of record are indicated by phrasing such as "available documentation demonstrates" and statements of opinion are duly noted as such.

This report is limited to the Coast Salish and Nootkan speaking peoples residing west of the Cascade Mountains in the geographic area covered by this case.

By: Barbara Lane, Ph.D.

November 30, 1972

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I. Indian Life at the Time of the Treaties

A. General Structure of Indian Life

Aboriginally and during the time when the treaties were negotiated, Indian settlements were widely dispersed throughout western Washington. Population density was higher than almost anywhere else in native North America north of Mexico. These two conditions depended upon (a) the peculiar potentialities of the habitat and (b) the successful and efficient utilization of available resources by the native population. Some fresh food was available on a year-round basis throughout much of the area, but the critical factor was that anadromous fish were available in prodigious quantities at predictable times. Efficient taking-techniques made it possible to harvest large numbers of fish as they ascended the rivers. Well-developed food preservation techniques insured that the huge harvest could be saved for use over an extended period of time. However, this was not a "lotus land" in which the native fisherman in a few hours' time could obtain a year's supply of food for his family.

The indigenous population occupied a series of ecological niches with varied topographic and climatic characteristics. Winter villages were situated on protected bays and inlets and along the rivers and streams. During the winter season, when people remained in their permanent villages, those living near the foothills contended with snow conditions unknown to the saltwater dwellers. These differing conditions materially affected the types of fresh foods accessible to the coastal and inland peoples during the cold weather.

In other seasons, when people ranged over a wider area and set up temporary camps at fishing locations, shell-fish collecting grounds, and the like, they were able to share access to resources not available in the immediate vicinity of their winter villages. Nevertheless, local differences in topography, rainfall, temperature and wind conditions remained important even though the area concerned was larger. The foregoing factors determined in part where particular species would be found, their

accessibility, and, in some cases their utility. Wind-drying of salmon, for example, as contrasted with sun-drying or smoking, was feasible only in a few locations.

There was considerable local diversity in the availability of animal, plant, and mineral resources used for food and artifacts. For example, the Makah had access to whale and halibut; the Stillaguamish and Sauk-Suiattle to mountain goat. The Lummi apparently imported various fibers and grasses from upriver Skagit and flint from Puget Sound. The Makah imported red ochre and diatomaceous earth from the Quileute. Red ochre was made from hematitic soils and was used for paint. Diatomaceous earth was used as a kind of soap for removing excess natural oils from dogs' wool used in the manufacture of native blankets.

Extensive trade was carried on among Indian groups in western Washington in order to acquire food stuffs, raw materials, and manufactured goods not available locally. The trade involved both basic necessities and luxuries of native life. The trade existed because different localities had different resources. The variation in local habitats is an important factor in understanding the native economy.

Despite the important local differences, it is still possible to make valid generalizations regarding Indian life west of the Cascades during treaty times.

The rugged hills and mountains and dense forest cover made communication by land exceedingly difficult over much of the area. The terrain and cover also set limits to the value of the land as a game and plant food collecting area. Apparently the heavily wooded areas supported a relatively sparse animal and bird population. Early travellers consistently reported the wooded areas in western Washington as silent, trackless, and little frequented by the Indians. According to the reports, the sighting of numerous animals invariably indicated the proximity of a natural prairie or clearing.

The forest animals included bear and cougar, the smaller tree-climbing species like fisher, martin, lynx, racoon, and squirrels, as well as smaller quadrupeds such

as mice. None of these was important to the Indians as a source of food. The larger land animals which were important to the Indians, like deer and elk, obtained most of their food in the open areas and may be considered prairie dwellers.

Prairies were also important food areas to the Indians in that root crops such as camas and wappato, wild onions and wild carrots were located in the open grounds. These natural prairies, which provided the only important land food areas for the Indians, were the first areas to be taken over by pioneer settlers who wished to farm without the arduous labor of clearing forested land.

Some of the inland groups hunted land animals more than their downstream neighbors and frequently game would be traded downstream for shellfish or other coastal commodities. There are occasional reports in the literature that a particular inland group depended primarily on hunting. No supporting evidence has been found to support such an assertion. The record indicates that nowhere in the area covered by this report did land game supplant fish as the staple food. For western Washington Indians, land resources were not nearly so important for food as saltwater and freshwater resources.

If the land environment posed difficulties, that of the sea and waterways provided major advantages to Indian existence. The Indians invariably lived next to waterways, traveled upon them, and depended on the resources of the waters for their major livelihood.

Some of the coastal groups engaged in daring feats of marine hunting on the open sea and in the straits. Saltwater and/or freshwater fishing was actively pursued by virtually every adult male throughout the area. Fishing was the universal male occupation. Shellfish collecting was a major occupation of women and girls. Waterfowl were taken on the water, on tidelands and mud flats, in aerial nets at their flyways, and diving species were taken with underwater nets in the same fashion as fish. Aquatic plants were used for food, medicine, and artifacts such as fishing line, etc.

The water resources were rich, but again there was tremendous local diversity. Types of marine life differed in the open sea, in bays, rivers and lakes. Topographic features such as depth of water and nature of bottom or shoreline predicated presence or absence of specific species in a given locale. Halibut are found in banks of about thirty fathoms in the ocean and straits, perch are seen in shallow water off rocky shores, flounder abound in sandy estuaries and bays.

Availability varied not only from area to area, but also seasonally. This depended not only on presence or absence of a given species in local waters at different times of the year, but also on seasonal availability of suitable bait. Furthermore, storms, rough seas, and fog made fishing impossible at certain times.

In addition to areal and seasonal variations, there was considerable fluctuation in abundance and availability from year to year. Some of this was regular and predictable, as in the case of runs of certain species and races of salmon. Other causes were erratic, such as flooding and alterations in watercourses.

Insofar as food was concerned, the native habitat provided limited land resources and rich marine resources. The latter were unevenly distributed over space and time. Their successful and efficient utilization required an intimate knowledge of local environments and the locally available species and a repertoire of specialized taking-techniques. In the case of fishing, gear and techniques were specific not only as to species but also to water conditions.

Throughout most of the area salmon (including steelhead where available) was the staple food and the most important single food resource available to the native population. This is a matter of record, attested to by historic and ethnographic evidence as well as by observations recorded in the years immediately preceding and following the 1854-1855 treaties.

An article in the July 15, 1853 issue of *The Columbian*, a newspaper published in Olympia, noted that

* * * "salmon is the principle article of Indian subsistence * * *"

George Gibbs, the lawyer-ethnologist who helped to draft and negotiate the treaties in western Washington, wrote an ethnological treatise entitled The Tribes of Western Washington and Northwestern Oregon which was published by the Smithsonian Institution. The monograph was based on observations made in 1850-56 although it was not published until 1877. In it Gibbs reported that "* * * salmon form the most important staple of subsistence* * *"

James Swan, who served as Governor Stevens' private secretary and who published extensively both on coast Indians and on fisheries, wrote in the August 9, 1862 issue of the *Washington Standard* "The most important fish taken in this Territory, both as regards the quantity and extensive use made of it by the natives for food, is the Salmon, of which there are sixteen distinct varieties, including the trout, which belong to the family of *Salmonidae*."

A great challenge was posed by the fact that this species could be taken in vast quantities, but only at particular periods of limited duration. To harvest this resource efficiently, the following were needed: (a) equipment of extensive size requiring cooperative effort (e.g., weirs, seines, reef-netting gear); (b) food-preservation techniques (e.g., sun-drying, wind-drying, smoking) and storage facilities (e.g., cedar boxes, baskets, bladders and kelp containers for fish oil, and smoke houses) so that the huge surpluses could be used later; and (c) an exchange system whereby local surpluses could be redistributed to people in other areas (e.g., ceremonial exchanges, trade).

The major food acquisition techniques in the area were fishing, hunting of land animals and sea-mammals, the collection of wild foods such as mollusks and other intertidal marine life, berries, and the digging of edible roots, shoots, and bulbs.

In order to take these foods as they became available

at certain places and seasons, it was necessary for people to range over the country to be on hand when the camas bloomed or the berries ripened or the salmon began to run. These seasonal movements were reflected in native social organization. In the winter, when weather conditions generally made travel and fishing difficult, people remained in their winter villages and lived more or less on stored foods — dried meat and berries and dried and smoked fish. Fresh fish and other foods were harvested during the winter. That season, however, was devoted primarily to intra- and inter-village ceremonies and manufacturing tasks. This was the time when people were congregated into the largest assemblages, occupying long multifamily houses made of split cedar planks. Throughout the rest of the year individual families dispersed in various directions to join families from other winter villages in fishing, clam digging, harvesting camas, berry picking, and other economic pursuits. People moved about to resource areas where they had use rights based on kinship or marriage. Such rights were clear cut and important in native society, but were not readily discernible to outside observers of Indian life. Ambiguity was compounded even for observant resident settlers because families did not necessarily follow the same particular pattern of seasonal movements every year. This gave non-Indians the impression that there was no stable political organization. The winter village had no "head chief" or "village council." Leadership and authority tended to be task oriented with the appropriate specialist taking over leadership according to the occasion, e.g., hunting party, communal fish drive, raiding party, life crisis ceremony.

Native society was hierarchical, in which upper-class people, commoners, and slaves were recognized. In parts of the region, stewardship rights and duties over resource-producing areas such as clam beds, reef-net locations, cranberry bogs, or camas beds were inherited.

The dense populations, stratified social organization, and complex ceremonial life which characterized native

culture in western Washington was made possible because of the effective utilization of available resources and the highly efficient means of redistributing periodically available surpluses.

B. Function of Fishing in Indian Life

The first-salmon ceremony, which was general through most of the area, differed in detail and was celebrated over different species from community to community. This was essentially a religious rite to ensure the continued return of salmon to the area. The symbolic acts, attitudes of respect, and concern for the well-being of the salmon reflected a wider conception of the interdependence and relatedness of all living things which was a dominant feature of native world view. Such attitudes and rites insured that salmon were never wantonly wasted and that water contamination was not permitted.

Elmendorf (1960:62) gives the following comments for the Twana (Skokomish) based on field work which began some twenty years prior to publication.

> Most ritually determined acts with reference to river fishing had to do with the salmon run and were directed toward insuring its continuance. The river had to be kept clean before salmon started running. HA [informant] defined the period as starting in early August (for the Skokomish), before the first king salmon came. From this time no rubbish, food scraps or the like, might be thrown in the river; canoes were not bailed out in the river; and no women swam in the river during menstrual seclusion. The object of these precautions was to insure that the salmon would want to come.

In native society, surplus food could be converted into wealth (canoes, blankets, slaves, shell ornaments). Dried or smoked salmon was easily stored and transported. At the same time, keeping qualities were of limited duration. Surplus preserved salmon was usually consumed or distributed within the year.

Distribution was effected through complex exchange systems involving voluntary gift giving to kin and friends, reciprocal gifting to specified affinal kin which sometimes

became competitive, intercommunity feasting, potlatching, and outright sale and trade beyond the local community and sometimes over great distances.

As the staple food, salmon was eaten either in fresh or cured form throughout the year. The large number of salmon recipes and variety of cooking methods, as well as the extensive trade in salmon, attest to the effort made to avoid monotony in the diet.

Trade was carried on to secure salmon species which did not run in local streams. In Makah territory, for example, sockeye did not visit any of the streams emptying into the Strait of Juan de Fuca, but they did ascend Ozette River to spawn in Lake Ozette. Sockeye were highly prized for flavor and fat content and were purchased by Indians who did not have access to a sockeye fishery.

Sometimes trade was for salmon of the same variety as that available locally. According to ethnographic accounts, people claimed to be able to taste differences between salmon of the same kind taken in different bays or streams.

Fish from the same run undergo change in flavor as they proceed from the saltwater to the spawning ground. It was not unusual for people to exchange fish taken at the mouth and the headwaters of a given water system.

Differences in keeping qualities were an overriding reason for much of the trade in salmon. Fat fish were favored for their taste, but did not keep well in the humid climate. They tended to become rancid. The dog salmon, or chum, less tasty but lean, formed the bulk of the dried and smoked winter stores.

Salmon were traded to the Puget Sound area from across the Cascade Mountains. Gibbs (1877:170) described the commerce as follows

> The trade between the two districts was once considerable. The western Indians sold slaves, haikwa, kamas, dried clams, &c., and received in return mountain-sheep's wool, porcupine's quills, and embroidery, the grass from which they manufacture

> thread, and even dried salmon, the product of the Yakima fisheries being preferred to that of the Sound.

The comment regarding preference should be understood in the context of the foregoing discussion and in the light of Gibbs (1877:194) later comments in the same volume. Writing of the salmon in the Columbia, he noted

> The salmon, which enter that river in the spring and are the only ones prized as food by the whites, do not seek either the small rivers of the coast or the lower tributaries near its mouth for the purpose of spawning, but push directly up the principal branches, such as the Willamette, the Snake, &c., to the colder waters of the mountains. * * * Later in season inferior kinds are abundant, and these also succeed in forcing their way up the larger branches, but in addition, leave detachments in every creek that enters the coast, every brook which unites with the rivers, and even in the sloughs formed by rain in the prairies. It is at this season that the coast Indians lay up their winter supplies; for those later species possessing lttle fat are the easiest dried for keeping. The Indians of the interior preserve the former kinds also, which after a stay in the fresh water have lost their superfluous oil, and these are often actually traded to those Indians at the mouth of the river or on the Sound.

As the food staple, fish provided essential proteins, fats, vitamins, and minerals in the native diet.

Fishing methods varied according to the locale but generally included trapping, dip-netting, gill-netting, reef-netting, trolling, long-lining, jigging, set-lining, impounding, gaffing, spearing, harpooning, raking, and so on.

Species of fish taken, again varying according to locale, included salmon and steelhead, halibut, cod, flounder, ling cod, rockfish, herring, smelt, eulachon, dogfish, trout, and many others.

The initial effect of the influx of non-Indians into western Washington was to increase the demand for fish both for local consumption and for export. Almost all of this demand, including that for export, relied on Indians to supply the fish.

The January 15, 1853 issue of *The Columbian*, published in Olympia, contained an article describing the resources and potential of the country to prospective immigrants. In a plea for the development of the fisheries, the writer complained

> * * * that what little has been done in the business of securing the salmon, has been done solely by the Indians, through their crude method, and slender appliances, and that their lazy and worthless habits prevent a sufficient bestowal of time and attention, in furnishing any considerable quantity for export, beyond their own necessities, and what is required for present home consumption.

The article goes on to mention, among other things, that smoked salmon has been but recently shipped to China at a first cost of 25¢ per pound. Perusal of the shipping notices published in Territorial newspapers of the time document export of salmon from Puget Sound to San Francisco and to the Sandwich Islands (Hawaii) as well.

Non-Indians did not engage as fishing competitors on any scale until the late 1870's.

Available evidence suggests that Indian fishing increased in the pretreaty decade for three major reasons: (1) to accommodate increased demands for local non-Indian consumption and for export; (2) to provide money for the purchase of introduced commodities like calico, flour, and molasses; and (3) to obtain substitute non-Indian goods for native products no longer available because of non-Indian movement into the area.

C. Non-Indians' Understanding of Indian Fishing

Available evidence suggests that despite superficial awareness on the part of some of the treaty commissioners that there were special rites, ceremonies, and observances concerning fish and fishing, there was little real understanding of native belief systems. They were regarded at best as interesting, at worst as examples of heathen superstition. As noted earlier, the major concern of the first salmon ceremonies was to insure the periodic return of salmon to their accustomed spawning grounds. A

theme in local Indian mythology deals with a period in the past in which malevolent individuals blocked streams to prevent the salmon coming up.

George Gibbs, in a letter to Colonel Ripley under date of July 21, 1857 described a tactic used in the recent hostilities in the Duwamish-Puyallup-Nisqually drainage areas. The following excerpt is from a draft of the letter. I have not seen the one actually sent. The deletions below are in the draft.

> The Salmon is everywhere the great staple of winter provision. It ascends in vast schools all the streams far up into the mountains. During the war, Col. Casey very sagaciously ~~took~~ ~~advantage~~ cut off the hostile tribes from this resource by constructing weirs at the mouths of the rivers in the hostile district, and thus alarmed the most obstinate bands into submission ~~by fear of~~ to avoid starvation.

It seems more likely to me that the Indians feared a permanent destruction of the runs in those rivers, rather than any immediate problem with supplies. My reasons for this opinion lie in the ritual and mythic preoccupation with insuring that the runs continue, but other evidence would seem to support this view.

A pioneer Puyallup valley resident discussing the hostilities of October 1855 many years later, had this to say (Meeker 1905:309)

> * * * Fish abounded in all the streams at that season of the year, and if interrupted at one place the women could find the salmon abundant elsewhere. Here was the spectacle of an army with strongholds as large as the field to be occupied, with food in all parts, even up to the most impenetrable forests of the foothills.
>
> It is astonishing how abundant these salmon are found in the small streams and even rivulets of the headwaters of the greater rivers below. * * * * * * The food could be obtained for many months, and even a supply accumulated for the later season when the salmon would disappear from the streams. When the final end came considerable supplies were captured and destroyed, silent wit-

> nesses of the industry and determined cooperation of the women in, to them, this great struggle.

From Meeker's account it appears that there was no immediate threat of starvation. This seems to me to support the view that the Indians were concerned about longer-range effects.

The role of fishing in the native economy was more readily appreciated although the intricacies of the native exchange systems and the social role of cooperative enterprises such as reefnetting and weir construction were probably not realized. What was clear was that the Indians depended upon fishing for their livelihood and that they could not be removed from their fisheries without destroying them.

In a report dated March 4, 1854, George Gibbs made a number of suggestions and recommendations relative to the treaties to be negotiated in Washington Territory. He commented in part (Gibbs 1967:28)

> To remove the Indians altogether into any one district is impracticable, for the western verge has been reached. To throw the fishing tribes of the coast back upon the interior, even were the measure possible, would destroy them; * * * *

The contribution made by Indian fishermen to the Territorial economy was also recognized.

There was clearly misunderstanding of Indian concepts of fishing "rights" and there was evidently no perception of Indian self-regulation. It was incorrectly assumed that the Indians recognized no private rights in taking fish.

Discussion of Indian concepts of fishing "rights" requires some examination of specific localities used and gear and techniques employed as these affected the manner in which "rights" were conceived.

The fishing areas used were basically of five kinds: (1) freshwater lakes; (2) freshwater streams and creeks draining into the various inlets; (3) shallow bays and estuaries; (4) the inlets and the Sound; and (5) the straits and ocean.

Customary use rights varied according to the type of locale and the gear being used. Winter villages were located along the salmon streams, at the heads of inlets near the mouths of such streams, and on protected coves and bays. The major requirements in the location of winter villages were shelter from the elements and from surprise attack, suitable beach or bank for launching canoes and for storing them above high water mark, and access to firewood, fresh water, and fishing stations.

The larger and more important villages were usually located at particularly lucrative fishing places: at the forks of a river where weirs could be set up; at the outlet of a river into a lake; and at the heads of inlets near the mouths of the salmon streams. Other large villages were located on the saltwater in protected coves and bays.

During the winter season, if people went out for fresh food stores, they used the fishing areas in closest proximity to their villages. During the spring, summer, and fall, people mo ed about to fish at more distant fishing grounds.

In general, I think it is correct to say that the freshwater fisheries were controlled by the locally resident population. During the winter season, the local residents were the exclusive users. At other seasons use rights at these locations and others within the territory of a particular group would be extended to visitors from other localities.

Visitors from beyond the immediate locality would arrive to take advantage of particular runs not available in their streams or not running at that particular time in their locality. Certain of these visitors would have use rights because they were related to local residents. Others might request permission to fish and such permission was normally extended provided that amicable relations existed between the local people and the visitors.

The situation with regard to saltwater fisheries appears to have been slightly more complicated. Shallow bays where salmon, flounder, and other fish were speared were often gathering places for people from a wider area.

This was especially true if shellfish beds were present. In the deeper waters of the bays, huge flotillas of canoes would gather to troll for the salmon as they gathered in the bays just prior to their entry into the rivers.

Meeker (1905:64) offers a first-hand account of fishing activities at the end of May or early June in 1853

> As we drew off on the tide from the mouth of the Puyallup River, numerous parties of Indians were in sight, some trolling for salmon, with a lone Indian in the bow of his canoe, others with a pole with barbs on two sides fishing for smelt, and used in place of a paddle, while again, others with nets, all leisurely pursuing their calling, * * *

People living upriver on a given drainage system would normally come to the saltwater areas at the mouth of the river to obtain fish and shellfish. At some of the major fishing locations, like Commencement Bay, people from other drainage systems would also congregate to join in the fishing.

The deeper saltwater areas, the Sound, the straits, and the open sea, served as public thoroughfares, and as such, were used as fishing areas by anyone travelling through such waters. However, both within the straits and off the west coast in the open sea there were halibut banks known to the Indians, used by them, and claimed as private property. Other private property rights to saltwater fisheries were recognized reefnet locations in the straits. Among the Makah, ownership of halibut banks was held in the name of the chief as stewart for his local kin group and retainers. With the Lummi reefnet locations, the situation was different. Individuals owned specific locations on the reef which they received by heirship. Owners of locations then hired relatives and friends to work with them in preparing the gear and fishing the site.

Based on his observations made in the mid-1850's and apparently without knowledge of either Makah or Lummi fisheries, Gibbs (1877:186) stated

> As regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the Sound particularly, from one to another locality, according to the season.

As intimated by the foregoing discussion, Gibb's generalization requires modification to cover adequately a range of local situations. His characterization is acceptable if it is understood to refer to saltwater fisheries and if it is understood that certain exceptions existed, notably in the halibut, cod, and sockeye fisheries.

As regards freshwater fisheries, all subsequent information about fishing and everything else known about western Washington Indian cultures indicate clearly defined property concepts. Ownership rights to specific fishing areas were well developed; at the same time, use rights were freely granted. Gibbs' statement appears to be concerned with use rights. If so, his characterization is useful, provided that the contexts and limitations noted above are understood.

D. Indians' Fishing "Rights" among Themselves

The nature of "rights" varied from individual inheritance of privately owned sites to shared access to specific trolling areas. Such rights were respected by Indians who did not share them. The latter might ask permission to use specific locations and/or gear and this would be granted usually. Trespass was rare and usually led to friction.

E. Controls over Indian Fishing

Indian control was by accepted, customary modes of conduct rather than by formal regulations involving enforcement and sanctions. With regard to salmon, it was necessary that the first fish from the run be treated ritually. In connection with this and the restrictions on defiling the river prior to the run, Elmendorf (1960:63) commented

> No special authority enforced the taboos on polluting the river prior to the beginning of the run. There was also no special "fish watcher" or

ceremonial lookout for the beginning of the run, although everyone in every Twana community was on the alert for this event.

Controls over fishing were necessary in cooperative efforts which required coordination by someone who organized and directed the group effort. The construction of a weir was usually a cooperative effort, a number of men working under the direction of a leader. The entire community usually had access to the weir, the leader regulating the order of use and the times at which the weir was opened to allow upstream escapement for spawning and/or supply of upriver fishermen.

Techniques such as spearing or trolling in saltwater which involved individual effort were not regulated or controlled by anyone else.

Generally, individual Indians had primary use rights to locations in the territory where they resided and secondary use rights in the natal territory (if this was different) or in territory where they had consanguineal kin. Subject to such individual claims most groups claimed exclusive fall fishing rights in the waters near to their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups.

There is no evidence of any attempt by the settlers to impose regulatory controls over Indian fishing prior to, at the time of the treaty negotiations, or for some time afterwards.

There is, however, evidence of Indian refusal to permit white fishermen access to privately owned fishing areas. Michael Simmons, who helped Governor Stevens negotiate all the treaties in western Washington, and who subsequently had an important career in the Indian Service, wrote of the Makah in his 1858 annual report as Indian Agent for Puget Sound district (Simmons 1858:583)

> Four gentlemen from California, have taken claims and established a trading post and fishery at Waada. They have been there for about nine months and have uniformly treated the Indians well; bought all the fish and oil they could bring for sale, (these Indians catch many whales) at liberal prices, yet they refuse to let them fish on the banks.

F. Location of Indian Fisheries

Indian fishing was not confined to certain types of locations. The Indians developed and utilized a wide variety of fishing methods which enabled them to take fish from nearly every type of location at which fish were present. The Indians with whom we are concerned harvested fish from the high seas, inland salt waters, rivers and lakes. They took fish at river mouths as well as at accessible points or stretches along the rivers all the way to the headwaters. Some locations were more heavily utilized than others.

Although there are extensive records and oral history from which many specific fishing locations can be pinpointed, it would be impossible to compile a complete inventory of any tribe usual and accustomed grounds and stations. Such an inventory is possible only by designating entire water systems.

There are a variety of reasons why any listing of usual and accustomed fishing sites must be incomplete and thus give a spurious kind of accuracy. First, as already noted Indian fisheries existed at all feasible places along a given drainage system from the upper reaches of the various tributary creeks and streams, down the main river system to the saltwater. Fishing stations which were also the site of weirs and permanent villages are more easily documented through archeological evidence, historical records, and ethnographic studies than are riffles where fish were speared. The nature of the gear used has tended to influence the recording of sites.

Second, Indian fishermen, like all fishermen, shifted to those locales which seemed most productive at any given time. The productivity of local sites varied with (1) volume of water in a stream at a particular season or year, (2) amount of mud or silt present at a given time, and (3) alteration in the watercourse due to flooding, log jams, and

other natural causes. The use of particular sites varied over time. There were traditional fishing locations which were used for as long as people could remember, but these were not fixed and unchanging because the watercourses themselves were not immutable and unalterable.

Third, a number of important fishing sites recorded in treaty times are no longer extant because of post-treaty man-made alterations in watersheds and water systems. Diversion of water for power purposes has lowered the carrying power of some streams and dried up others; engineering for flood control has altered the course of rivers; canal-cutting has lowered lake levels; and land fill operations have obliterated still other fishing stations. When sites are demolished, their existence is eventually forgotten.

Fourth, other sites are still extant but are no longer used by Indian fishermen because the appropriate Indian gear for those particular sites has been outlawed by the State or because competing users, not necessarily fishermen, have made utilization of these sites by Indian fishermen unfeasible. In still other instances, extant usual and accustomed sites are no longer fished because the species taken in treaty times have been destroyed by post-treaty events. Alteration of water temperature and water level, industrial pollution, and the fencing of spawning creeks by private land owners are some of the causes.

II. Negotiation and Execution of the Treaties

A. Purpose of Treaty as a Whole

The Indians had received constant assurances from white settlers and from government representatives that they would be compensated for lands which were being settled on and for loss or destruction of native property incident to white settlement. The Indians were concerned that these things be done by mutual agreement.

George Gibbs became a key member of Governor Stevens treaty commission and helped to draft the treaties as well as to negotiate them. In a report dated March 4,

1854, Gibbs made a number of suggestions relative to the treaty negotiations which began later that year. Apparently referring to the fact that there were no outstanding unratified treaties in Washington Territory, Gibbs observed

> No conventional arrangements, strictly so speaking, are known which need action on the part of the government; but the assurance has everywhere been given by the whites, settling among the Indian tribes, that Congress would compensate them for the lands taken.

The United States was concerned to extinguish Indian title to the land in Washington Territory legally, in order to forestall friction between Indians and settlers and between settlers and the government. The Act creating Oregon Territory provided that Indian land title should be extinguished by treaties. Before Indian title had been extinguished, the Donation Act had thrown open land to settlement and induced non-Indians to migrate and take up land claims. This state of affairs concerned the new Governor of Washington Territory and his attitude was shared by the Commissioner of Indian Affairs, George W. Manypenny, who wrote to Stevens under date of April 4, 1854

> With you, I feel anxious that Congress should immediately make provision for extinguishing the Indian title to lands in Washington Territory.

Further, until treaties were concluded and reservations were established, it was impossible to enforce the trade and intercourse laws regulating traffic in liquor and commercial relations in Indian country.

B. Meaning of "The right of taking fish, at all usual and accustomed grounds and stations, is further secured"

Apparently this language originated with George Gibbs, who drafted the treaties in western Washington, although the suggestion itself was made earlier by at least one other party.

In a report submitted in 1853, E. A. Starling, Indian

agent for Puget Sound offered the following suggestions (underlining mine)

I would recommend that, when treaties are made with these tribes, their future homes be all included in one reservation—each tribe having the extent of its reservation marked off—and *their fishing grounds be granted them*; and over the reservation, that the law regulating trade and intercourse with the Indians, and any other law relating thereto, be extended with full force.

There is no record of the Chinook jargon phrase actually used in the treaty negotiation. In my opinion, it would have been possible to convey the meaning of the above language adequately through the medium of Chinook jargon. The English word fish is "pish" in Chinook jargon. Presumably this generic term was used in the treaty talks and it is likely that it would have been understood by the Indians in the same sense as the whites.

There is no mention of restrictions as to purpose, time, or method of taking either in the treaties themselves or in the official records relating to treaty proceedings. It is my opinion that no such restrictions were indicated by the commissioners or contemplated by the Indians. The treaty commissioners knew that fish were important to the Indians, not only from the standpoint of their food supply and culture but also as a significant element of trade with the settlers. Both parties wanted these aspects to continue — the Indians in order to sustain their prosperity and the government in order to promote the prosperity of the Territory. I believe that both parties intended the Indians to continue full use of their fishing places, even though most lands adjacent to fishing waters were ceded.

C. Meaning of "in common with all citizens of the Territory"

This language appears to have been introduced by Gibbs. There is no record of the Chinook jargon translation which was used in the treaty negotiations. There is nothing in the official record to suggest that the U.S. intended "in common" to connote future control by "citizens" over Indians. It is my opinion, based partly on

evidence in the official record and partly on inference from ethnographic data, that at least some of the Indian parties expected to exercise control over "citizens" fishing at usual and accustomed Indian fishing sites.

There is no clear evidence as to whether "in common" was intended to connote fishing at the same place, or on the same run, or at the same place on the same run, or something else. Stevens asserted that Indian and non-Indian fishing techniques were so different as to preclude competition, but this information was incorrect.

In a letter to George W. Manypenny, Commissioner of Indian Affairs dated December 30, 1854, transmitting the Treaty of Medicine Creek, Governor Stevens commented on the treaty provision regarding the taking of fish as follows

> It may be here observed that their mode of taking fish differs so essentially from that of the whites that it will not interfere with the latter. They catch salmon with spears in deep water and not with seines or weirs.

The Puyallup Indians who were party to the Treaty of Medicine Creek were using both seines and weirs extensively at the time that Stevens wrote and had been doing so for some years previous. I am unable to account for his assertion that the Indians did not use seines or weirs. I suppose it is possible that Governor Stevens was ignorant of the facts, although it is hard to credit this. The other members of the treaty commission were certainly aware of Indian methods of taking fish and according to the official treaty notes the subject of Indian fisheries was thoroughly discussed by Stevens, Doty, Simmons, Shaw, and Gibbs prior to the Treaty of Medicine Creek.

In my view, the most likely Indian interpretation of the "in common" language would be that non-Indians were to be allowed to fish with-out interfering with continued pursuit of traditional Indian fishing. I think it most likely that the government intended to provide for non-Indian participation in fishing with no thought that this would require any restriction of Indian fishing.

D. Signing the Treaties

Generally, Indian signatories were individuals who had some sort of friendly contact with non-Indians. A few spoke Chinook jargon and probably most were men of importance in their communities, although they were not necessarily the most important men. The "head chiefs" were chosen by Simmons and Stevens. The "sub-chiefs" and "leading men" were selected by Simmons and Stevens, sometimes with the aid of the "head chiefs". The basis for choice were friendliness to Americans, real or apparent status in their communities, and ability to communicate in Chinook jargon. The "sub-chiefs" and "leading men" were intended by the U.S. to represent the bands to which they were thought to belong. Various "bands" and "fragments of tribes" were arbitrarily assigned a subordinate status to other "tribes", each of which had been assigned a "head chief". The latter were taken to represent not only the group to which they belonged, but all other groups which had been declared subordinate to it. The signatories, in the U.S. view, had the capacity to alienate land belonging to such groups. On the Indian side, there was no precedent for signing legal documents, nor was there any culturally sanctioned method of formally alienating land.

E. Communication

It is hazardous to judge the extent of communication of either specific terms or of underlying purposes and effect without a transcript of the actual Chinook jargon used to interpret the treaties. We have no knowledge that any Indian present at any of the treaties understood English. It is a matter of record that many, if not most of those present, did not even understand Chinook jargon. It is also a matter of record that the official interpreter, Shaw, spoke no Indian language and had to use Chinook jargon to interpret the treaties, which were then re-interpreted into the various Indian languages by Indians who understood the jargon. The double translation resulted in the Indians receiving the information at third hand and increased t'[illegible] potential for confusion.

Chinook jargon, a trade medium of limited vocabulary and simple grammar, is inadequate to express precisely the legal language embodied in the treaties. Its inadequacy was commented upon by both Indians and non-Indian witnesses to the treaty negotiation.

The views of Leschi, one of the Nisqually chiefs who repudiated the treaty, are set out in a letter from Dr. William F. Tolmie of the Puget Sound Agricultural Company at Fort Nisqually to Fayette McMullen, Governor of Washington Territory dated January 12, 1858. Dr. Tolmie referred to a trip Leschi had made in spring 1855 to search out a young relative of his who had been taken to Oregon in 1849 by the Indian agent of that time, Mr. Thornton. In the following excerpt from Tolmie's letter, I have supplied the italics

> Leschi has lately informed me and his statement is corroborated by others that he wanted his cousin from Albany to be interpreter for the Nisqually tribe, as in dealing with the whites on such momentous affairs as the sale of their lands *he felt the great disadvanage the Indians labor under, in having no better medium of communication than the Chinook Jargon*. Finding however, that his cousin had forgotten the Nisqually language, he did not urge his return.

III. Current Successors to Treaty Tribes

The following are my conclusions regarding those tribes to which I have been asked to direct my attention. The fisheries listed in this summary are not to be taken as the only important fisheries of each group.

Conclusions Based on Available Documents and Ethnographic Data

A. Makah

1. The Makah Indian Tribe is composed primarily of descendants of the 1855 villages of Neah, Waatch, Tsoo-yess, and Osett.
2. The above-named villages are named in the preamble to the Treaty with the Makah, January

31, 1855 and at least four signatories are identified with each village separately.

3. The principal salmon fisheries of the Makah included Ozette Lake, all the salmon streams from Ozette River north along the Pacific coast and east along the Strait to the Lyre River in Clallam territory and adjacent saltwater areas.
4. At treaty times and in the decades immediately preceding and subsequent to the treaty, the Makah engaged in extensive trade based on a commercial maritime economy.
5. Governor Stevens appreciated the commercial nature and value of the Makah marine hunting and fishing economy and at the treaty assured the Makah of government aid in developing these pursuits.
6. Cultural differences prevented the Stevens party from fully comprehending the property rights which the Makah asserted when they signed the Treaty. The Makah understood the Treaty in one way; the whites understood it in another.
7. Although salmon were less important to the Makah as a food staple in treaty times than halibut, salmon was a vital component in the native diet. In addition to providing variety in the food fare, preserved fall salmon was vital in securing provender in the winter when it was too rough for outside fishing.
8. Post-treaty events and developments beyond Makah control have altered the relative importance of the various Makah fisheries. One consequence has been to increase the importance of the Makah of their salmon fisheries.

B. Quileute

1. The Quileute Tribe of Indians is composed primarily of descendants of the Quil-leh-ute and other bands of Indians residing on the watershed of the Quileute and Hoh River systems.

2. The Quil-leh-ute (including the Hoh) were included in the Treaty of Olympia, July 1, 1855 and are mentioned by name in the preamble. At least one signatory is identified on the treaty as Quilley-hute.
3. The principal fisheries of the Quil-leh-ute were Ozette Lake, Lake Dickey, the Dickey River, Quileute River, Hoh River, and their tributaries, as well as the saltwater adjacent to their territory.
4. The Quileute were primarily dependent on salmon for their staple food. When the salmon supply failed, either through occasional small runs or through swollen rivers making it difficult for the Indians to take them, people starved.

C. Hoh

1. The Hoh Tribe or Band of Indians is composed primarily of descendants of the Hoh, an 1855 geographical division of the Quileutes.
2. The Hoh were included as a band of the Quil-leh-ute in the Treaty of Olympia, July 1, 1855.
3. The principal fisheries of the Hoh branch of the Quileute were on the Hoh River from its upper reaches to its mouth and on the tributaries thereto. The saltwater fisheries were in the area adjacent to Hoh territory.
4. The Hoh were primarily dependent on salmon for their staple food. Although they had a summer troll fishery in the coastal water, they relied on the fall runs in the river for their winter stores. The upriver fisheries were of strategic importance. The bulk of the fall salmon were taken by means of weirs set in the river.
5. The Hoh Indian Reservation was established in order to enable this branch of the Quileute Tribe to remain at their valuable fisheries.

D. Skokomish

1. The Skokomish Tribe of Indians is composed

primarily of descendants of the Skokomish and To-an-ooch who lived in the drainage area of Hood Canal.

2. The above two groups were named in the preamble of the Treaty of Point-No-Point, January 26, 1855. Five signatories are identified as Skokomish on that document.
3. The principal fisheries of the Skokomish before, during, and after treaty times included all the waterways draining into Hood's Canal and the Canal itself.
4. Salmon was the most important source of food for the Skokomish. Four species of salmon as well as steelhead were taken in the rivers, eaten fresh and dried for winter use. Saltwater trolling and spearing was less important than river fisheries.
5. The bulk of the stream fish were taken by means of weirs. At least one of the Skokomish signers to the Treaty of Point-No-Point was the supervisor of an important weir on the Skokomish River.
6. One of the Skokomish signatories to the Treaty of Point-No-Point was the supervisor of an important Skokomish weir in the Skokomish River.

E. Squaxin

1. The present day "Squaxin Tribe of Indians" is composed primarily of descendants of the original inhabitants of all the inlets of upper Puget Sound from South Bay on Henderson Inlet around the head of the Sound to North Bay on Case Inlet. Included are: Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley, and Case Inlets.
2. The Indian inhabitants of the above inlets were listed separately by local group name in the preamble to the Treaty of Medicine Creek and were included along with the Puyallup, Nisqually, and other groups in that treaty. The following names are extracted from the longer series in the

preamble to the Treaty of Medicine Creek. I have added the appropriate inlet location for each named group.

Group name as it appears in treaty	Inlet location
Squawksin	Case
Steh-chass	Budd
T'Peeksin	Totten
Squi-aitl	Eld
Se-heh-wamish	Hammersley

3. The Indians residing on the various inlets of upper Puget Sound were placed on the Squaxin Island Reservation in 1855 and *thereafter were known collectively as "Squaxin" Indians* and were dealt with by the United States as a separate and collective entity.
4. The ancestors of the present "Squaxin Tribe of Indians" were included in the Treaty of Medicine Creek and the United States has always recognized and treated the amalgamated "Squaxin" as a Medicine Creek Treaty tribe.
5. "Squaxin" tribal members today do not reside on the Squaxin Island Reservation, but rather in the localities where their ancestors lived in aboriginal times on the various inlets of upper Puget Sound, often in close proximity to the old village sites.
6. Ancestors of the present "Squaxin" Indians fished the entire area of upper Puget Sound including all the creeks and streams draining into the head of the Sound as well as the saltwater estuaries and bays and the open saltwater.
7. Prior to the 1854 Treaty of Medicine Creek, salmon played a vital role in the economic, social, and religious life of the Indians of upper Puget Sound.
8. Salmon continue to be important to the "Squaxin" as evidenced by continued fishing activity, building of smokehouses, and preservation of salmon by traditional curing techniques.

F. Nisqually

1. The Nisqually Indian Community of the Nisqually Reservation is composed primarily of descendants of the Nisqually and neighboring other Indians, including the Steilacoom, living near the Nisqually River in 1854.
2. The Nisqually and Steilacoom are mentioned by name in the preamble to the Treaty of Medicine Creek, December 26, 1854. None of the signatories to that treaty is identified as to tribe or band, but several of the men whose names appear as signatories can be identified as Nisqually through other historical documents.
3. The Indians who were assigned to the Nisqually Reservation, including the Steilacoom, were thereafter known as Nisqually Indians and were dealt with by the United States as a separate and collective entity.
4. The principal fisheries of the Nisqually Indians included the Nisqually River and its tributaries, as well as the numerous lakes in the area occupied by the Nisqually and Steilacoom. Although some of the principal villages at the time of the treaty were located upriver at the junction of various creeks with the Nisqually River, saltwater fisheries were also utilized.
5. Salmon was the most important single food of the Nisqually. In addition, salmon played a central role in the ceremonial and religious life of these Indians.
6. Salmon continued to be important to the Nisqually as evidenced by continued fishing activity.

G. Puyallup

1. The Puyallup Tribe is composed of descendants of the 1854 Puyallup of the Puyallup River, the Homamish of Vashon Island, and other neighboring Indians, as well as non-Indians who became Puyallup through intermarriage.

2. The population of the Puyallup River villages and the Vashon Island Puyallup at the time of the Treaty of Medicine Creek was estimated to be about 150 people, but very likely the actual number was greater.
3. The Puyallup and the Homamish are named in the preamble to the Treaty of Medicine Creek, December 26, 1854. None of the signatories to that treaty is identified as to tribe, band, or village affiliation.
4. The principal fisheries of the Puyallup were in Commencement Bay and the adjacent saltwater areas of Puget Sound and along the Puyallup River and its tributaries.
5. Salmon was the most important single food for the Puyallup. Four species of salmon as well as steelhead were eaten fresh, smoked, dried, and smoked-and-dried.
6. Salmon were taken in the saltwater by trolling, spearing, and with a seine. In the rivers the principal methods were weirs, traps, spearing, gaffing, and netting either with lift nets or river seines.
7. The reason for the location and size of the original Puyallup Reservation was to locate the Indians where they would have immediate access to both their saltwater fisheries and a stream which was a traditional fall salmon fishery. The small size of the original reservation as well as its difficult terrain were considered unimportant by the United States' representatives because the Indian were primarily fishermen.

H. Muckleshoot

1. The Muckleshoot Indian Tribe is composed primarily of descendants of the Skopamish, Stkamish, and Smulkamish bands who lived in the Green River-White River area in 1855.
2. The three above named bands are listed in the

preamble to the Treaty of Point Elliott, January 22, 1855. Chief Seattle signed for these bands on that treaty.

3. The principal fisheries of the ancestors of the Muckleshoot both prior to and during treaty times included Green River, White River, Stuck River, Cedar River, and tributary creeks.

I. The Stillaguamish Tribe of Indians

1. The Stillaguamish Tribe of Indians is composed primarily of descendants of the Stoluckwamish and other Indians living on or near the Stillaguamish River in 1855.
2. The Stoluckwamish are named in the preamble to the Treaty of Point Elliott, January 22, 1855. They were signed for by Patkanam who was designated head-chief to represent them as well as other Indians at the treaty.
3. The principal fisheries of the Stoluckwamish were located on the Stillaguamish River system from its upper reaches to the mouth.

J. The Sauk-Suiattle Indian Tribe

1. The Sauk-Suiattle Indian Tribe is composed primarily of descendants of the Sakhumehu and other Indians who lived on the upper tributaries of the Skagit River in 1855.
2. The Sakhumehu are named in the preamble to the Treaty of Point Elliott, January 22, 1855. One of the signatories is identified as "Sakhumehu" on that document.
3. The principal fisheries of the Sakhumehu were the headwaters of Skagit River including Baker River, Sauk River and the smaller creeks which belonged to that water system.

K. Lummi

1. The Lummi Indian Tribe is composed primarily of descendants of Indians who in 1855 were known as Lummi or Nook-Lummi and who lived in the area

of Bellingham Bay and near the mouths of the rivers emptying into it.

2. The Lummi were party to the Treaty of Point Elliott, January 22, 1855. Fourteen signatories to that document are identified as Lummi.
3. The principal fisheries of the Lummi included reef-net locations for sockeye at Point Roberts, Village Point, off the east coast of San Juan Island as well as other locations in the San Juan Islands. Other fisheries included Bellingham Bay and the surrounding saltwater areas. The Lummi had important freshwater fisheries on the river system draining into Bellingham Bay.
4. Several Lummi signatories to the Treaty of Point Elliott were owners of valuable reefnet locations near Point Roberts.

IV. **Post-treaty Actions**

A. Comparison of Current Function of Fishing in Indian Life with Same at Treaty Time

Western Washington Indians appear to have discontinued most outward religious forms such as the first-salmon ceremony and some associated beliefs, while retaining other beliefs and certain traditional attitudes and feelings regarding salmon and their environment. An analogy might be drawn with those Christians who do not attend church or pray, but who nonetheless feel bound to the Christian faith and whose lives are much influenced by it. It is clear that many Indians continue to regard salmon in a light which is quite different from that of non-Indians.

Trade in fish was a vital component of aboriginal life in western Washington. During the 1850's, 1860's, and 1870's, Indian fishing and Indian trade in fish formed an integral part of the pioneer economy. As non-Indians began to compete in the fisheries, laws and regulations were promulgated which made it increasingly difficult for Indians to participate as entrepreneurs or even as fishermen. As they have been forced out of the fisheries, fewer Indians and smaller quantities of fish are involved.

For many Indians, fish continue to provide a vital component in their diet. For others, fish is not a necessary dietary item although it remains an important food in a symbolic sense. (Thanksgiving turkey is not essential for physical survival, but contributes to our spiritual well-being because it provides an emotional link with our past.) Few habits of human beings are stronger than dietary habits and their persistence is usually a matter of emotional preference rather than nutritional need. For many Indians, salmon remains important in an economic, nutritional, and symbolic sense.

Historically and to the present day, taking, preparing, eating and trading fish have been important functions in Indian communities. As such, fishing provides a basis for cultural identity and a cohesive force in Indian society.

Traditional Indian fishing methods were highly efficient. These methods survived where Indians were allowed to maintain them; that is, where they were not outlawed or where Indians were not prevented access to areas where the methods were feasible. When necessary or appropriate, Indians have adopted new techniques and gear. Indians no longer fish from dugouts, just as non-Indians no longer fish from wooden sailboats. Indians no longer use bark nets and whites no longer use cotton or linen nets.

Indians of western Washington continue to fish for most of the species for which they have always fished. A few are no longer utilized because they are now rare (e.g., eulachon) or because they are no longer in demand (e.g., dogfish for oil). Salmon and halibut remain today, as in pre-European times, the fish of major interest both for consumption and for exchange.

B. Tribal Identity

Continued existence of viable Indian communities, "tribes", "bands", and so on, is not dependent upon nor coterminous with federal recognition. There may be biological, cultural, and geographic continuity since

pre-treaty times, as in the case of the Sauk-Suiattle for example, without federal recognition.

Continuing Indian identity is evidenced by (a) overt traits of aboriginal Indian culture which continue into the present (e.g., language, food preservation methods, games such as lahal, the "bone game", winter dances with the associated spiritual beliefs, art forms, kinship and social links); (b) aboriginal forms which have been melded with introduced ideas to create new, but uniquely Indian features (e.g., the Shaker Church, Indian sweaters, and the modern invention, the Coast Salish spinning device); and (c) persistence of traditional knowledge and belief in the importance of that knowledge (e.g., community histories, location of fishing sites, myths, tales, and songs). This knowledge is as relevant to Indian identity as the knowledge of American history is to the "Americanism" of all of us.

C. Attitudes Toward Rights and Powers Secured and Established by the Treaties within the 25 Years Post-Treaty

Throughout the area Indians consistently attempted to assert their treaty protected fishing rights as evidenced by efforts to maintain control of their fishing sites and by litigation concerning these issues. Non-Indian activity over the years has served to erode the value of Indian fisheries. River fisheries have been destroyed because of power development and use of rivers for navigation and transport. In-shore fisheries have been destroyed through building of breakwaters and harbor development. In addition, these and off-shore fisheries have been depleted by over-fishing by non-Indians. These activities evidence an unawareness of or lack of concern with treaty provisions. In the first two decades after the treaty making, the Indians were able to enjoy their treaty-protected fishing rights without much difficulty. Later, the State actively opposed treaty fishing provisions and sought to curtail Indian rights for the benefit of non-Indian citizens.

V. **Specific Conclusions**

A. Interpreting the Treaty

It was the clear and unequivocal intent and understanding on the part of both Indians and whites at the treaty-signing that the reservations were to be residential bases from which the Indians were to continue to utilize the total environment, including specifically all of their fishing locations, in order to maintain themselves and to contribute to the economy of the entire population. Also it was clear that there was no intention of creating a class society with Indians on the bottom economic rung. The treaty commission clearly undertook to provide the Indians the means of participating and prospering in the economy of the Territory. The contribution was seen to be primarily in the fisheries. Indian understandings were similar.

No post-treaty regulations as to time, place, manner or purpose of their taking fish were anticipated by the Indians, nor is it likely that this was envisaged by the treaty commission. Indians did not anticipate a requirement that they permit non-Indians to fish at their usual and accustomed places, such as weirs, reef-net locations, and privately-owned halibut banks, while the Indians fished there. The "in common with" language must have been understood and intended by both parties to assure non-Indians an opportunity to engage in fishing, but not at the expense of existing Indian claims and rights. Undoubtedly the Indians understood that the non-Indians would share access to saltwater seine and troll fisheries. Indians had no reason to expect that it would become necessary for the State to limit non-Indians' harvest to provide an Indian harvest.

The very fact that the United States made treaties indicates that the federal government was concerned to integrate Indians into the new order by peaceful and legal means. Legal recognition of pre-existing Indian tenure and use rights is evidenced in the alienation of Indian lands by treaty-arranged compensation. Indian fishing rights were

specifically exempted from such alienation, and this is further attested by the fact that no compensation was arranged for their extinguishment.

In my opinion, the "in common" language was intended to allow non-Indians to fish subject to prior Indian rights specifically assured by treaty.

MAKAH ECONOMY CIRCA 1855 and the MAKAH TREATY:

A Cultural Analysis

by
Dr. Barbara Lane

In the 1850's and 1860's several Americans resided at Neah Bay and their accounts provide further corroboration for data later recorded by Waterman.

In 1941 the Makah Tribal Council prepared a list of Makah fishing places from information supplied by members of the tribe. This list (see appendix 1) contains information about in-shore and off-shore locations which do not appear on Waterman's map. He evidently inquired only about locations on land. Where they overlap, the 1941 data on land sites substantially corroborate Waterman's information.

The Waterman maps locate traditional sites attested to by archaelogical evidence, mentioned in historical documents dating from the late eighteenth century through the treaty era, and still regarded as important by Makah Indians in 1941.

Special Features of Makah Environment and Makah Trade

There were two very special features of the Makah environment which require our notice. First was the existence of a seemingly inexhaustible supply of halibut to which the Makah had access by virtue of (a) ownership of lucrative fishing banks respected by competing tribes, (b) a highly developed technology capable of efficiently harvesting the resource, and (c) intensive processing and marketing of the finished product. The halibut was so intensively fished and utilized that it not only was processed and marketed wholesale; it supplanted salmon as the food staple in this area. Swan (1868:6-7) discussed this at some length:

> The reason why the roofs of the houses are so different from those of the Chihalis and Chinooks, at the Columbia river, is that they are used to dry fish upon. Now, the Chinooks and Chihalis, as well as all the tribes on the sound and coast, store great quantities of fish for their winter's use; but the fish they dry are salmon, which require to be cured in the smoke and protected from the sun and rain. Consequently, the tribes above mentioned use pitched roofs, or roofs much more elevated than those of the Makahs. But the staple of the Makahs is halibut, which, to be properly cured, is cut into thin slices and dried, if possible, in the open air without smoke; the best portions being those that have kept white and free from any color. As the climate is very humid, it is rare that a season is propitious for the curing their fish; so they have their roofs as flat as possible, and during fair weather, in the fishing season, not only are these covered with the slices of fish, but quantities are hung on horizontal poles fastened across the ends of the uprights that form the side fastenings to the houses. The appearance of one of the lodges on a fine day in summer when plenty of fish are drying is that of a laundry with clothes out bleaching. When the weather threatens to be rainy, the occupants proceed to the roof, and by removing several boards, they can stow away their provender in a very few minutes, and again replace it in the open air on the return of fair weather.

The second feature was the unavailability of good quality cedar in the Cape Flattery area. In aboriginal and early historic times cedar was an indispensable and basic material in Northwest Coast cultures. Houses were made of cedar planks, canoes were fashioned out of cedar logs, storage containers were kerfed and bent cedar boxes and cedar baskets, and clothing was made of shredded cedar bark and woven cedar. Ceremonial masks were carved of cedar. The Makah imported most of these items a especially such basic necessities as their large canoes a house materials from Vancouver Island. Swan (1868:4) wrote

> The houses of the Makahs are built of boards and planks, split from the cedar. These are principally

made by the Indians of Vancouver Island, and procured by barter with them. There is very little cedar about Cape Flattery, and such as is found is small and of inferior quality.

Speaking of canoes, he noted that the large ocean-going canoes were imported from Nootkans across the Strait.

* * * The largest and best canoes are made by the Clyoquots and Nitinats on Vancouver Island; the cedar there being of a quality greatly superior to that found on or near Cape Flattery. Canoes of the medium and small sizes are made by the Makahs from cedar procured a short distance up the Strait or on the Tsuess River (Swan, 1868:35).

The Makah were able to import their basic needs such as housing materials and the ocean-going canoes used for sea-mammal hunting and ocean fishing because of the peculiarly rich resources available to them in their ocean territories, primarily halibut and whale. Dried halibut and processed whale oil were traded to their Nootkan relatives for cedar products. They were thus able to maintain a flourishing culture of classic Northwest Coast type even though they lacked one of the basic raw materials — good quality cedar. Colson (1953:4-5) has put it aptly:

> The Makah were primarily a seafaring people who spent their lives either on the water or close to the shore, seldom venturing more than a few miles inland. Most of their subsistence came from the sea where they fished for salmon, halibut, and other fish, and hunted for whale and seal. The excess over what they needed for consumption within the village was traded to other tribes in return for many of the raw materials and some of the finished articles used in the daily and ceremonial life of the village. There was little in their material culture *therefore* (italics mine, B.S.L.) to differentiate them from other tribes about them.

The Makah were also involved in a much wider trade with non-Nootkans up and down the coast. Swan (1868:30-31) reported

> Trade. — The Makahs, from their peculiar

> locality, have been for many years the medium of conducting the traffic between the Columbia River and Coast tribes south of Cape Flattery, and the Indians north as far as Nootka. They are emphatically a trading, as well as a producing people; and in these respects are far superior to the Clallams and other tribes on Fuca Strait and Puget Sound. Before the white men came to this part of the country, and when the Indian population on the Pacific coast had not been reduced in numbers as it has been of late years, they traded largely with the Chinooks at the mouth of the Columbia, making excursions as far as the Kwinaiult tribe at Point Grenville, where they met the Chinook traders; and some of the more venturesome would even continue on to the Columbia, passing through the Chihalis country at Gray's Harbor and Shoalwater Bay. The Chinooks and Chihalis would in like manner come north as far as Cape Flattery; and these trading excursions were kept up pretty regularly, with only the interruption of occasional feuds and rivalries between the different tribes, when the intercourse would be suspended, or carried on by means of intermediate bands; for instance, the Chinooks would venture up as far as Chihalis, or perhaps Kwinaiult; they would go as far as the Kwilleyute, and these last in turn to Cape Flattery. After a while peace would be restored, and the long voyages again resumed. The Makahs took down canoes, oil, dried halibut, and hai-kwa, or dentalium shells. The large canoes were almost invariably made on Vancouver Island; for, although craft of this model are called "Chinook" canoes, very few in reality, except small ones, were made at Chinook, the cedar there not being of suitable size or quality for the largest sizes, and the best trees being found on the Island. The Makahs in return received seaotter skins from Kwinaiult; vermilion or cinnabar from the Chinooks, which they in turn had procured from the more southern tribes of Oregon; and such articles of Indian value as might be manufactured or produced by the tribes living south of the cape. Their trade with the northern Indians was for dentalium, dried cedar bark for making mats, canoes, and dried salmon; paying for the same with dried halibut, blubber, and whale oil. Slaves also constituted an important article of traffic; they were purchased by

the Makahs from the Vancouver Island Indians, and sold to the coast Indians south.

Makah trade as of the early 1860's based on material extracted from Swan is summarized in Table 1. This table has been constructed especially for this report and is derived from data scattered throughout Swan's 1868 publication and his earlier articles. Although Swan's observations date only from 1859 at which date he became interested in the fisheries at Neah Bay, many if not all of the items in the table must have been traded for many years prior to Swan's arrival among the Makah. For example, the absence of large cedar of good quality and the consequent import of house planks and ocean-going canoes is not likely to have commenced abruptly in 1855. Mozino (1972:65), discussing Nootka Sound in 1792, mentions native trade as far south as Neah Bay and lists canoes as one of the trade items. Most of the items in Table 1 are native goods traded among Indians, rather than introduced European goods. This suggests that the trade is not a recent development. Import of ceremonial items such as masks implies some antiquity because masks were not imported as curios, but as part of a coherent ceremonial complex. The fact that so many of the items were necessities of everyday life argues against an interpretation that this was a recent trade stimulated by contact with European trading vessel.

In the late eighteenth and early nineteenth centuries and doubtless for hundreds of years before, the Makah engaged in two kinds of trade with neighboring Indians along the Strait of Fuca and along the Pacific coast. In the first instance, the Makah exported large surpluses of a limited number of marine products produced and processed in Makah territory. These were: whale oil, dried blubber, dried halibut, and dried herring eggs. This small inventory of exports was exchanged for a wide variety of native goods including both necessities and luxury items of aboriginal life. Secondly, the Makah acted as middlemen deriving wealth by importing goods for resale elsewhere. Canoes, slaves, and dentalium shell (a form of

native currency) were imported from Nootkans on Vancouver Island for sale to the Clallam farther up the Strait and to the Quileute and Quinault to the south.

When European ships began visiting the Cape Flattery area in the eighteenth and early nineteenth centuries, they regularly put in at Neah Bay to replenish their stocks of fresh and dried fish as well as to trade for furs. In addition, they purchased "train oil" (oil extracted from blubber, seal, cod, etcetera) which was used for machinery lubrication. Boit's log from the "Columbia," September 30, 1792 just after leaving Neah Bay notes

> The Indians brought a few skins and plenty of fish and some train oil which last article we much wanted.

The Hudson Bay Company established Fort Langley on the Fraser river in 1827 and Fort Nisqually in 1833. The Makah visited both of these trading posts, bringing sea otter skins and beaver skins. As the market for whale oil and dogfish oil increased in the 1840's and 1850's, the Makah brought oil for sale and imported additional quantities from Nootkans of Vancouver Island to sell to the whites. Oil purchased from the Indians was a major export of the Hudson's Bay Company. The oil was used locally for machinery lubrication in milling operations and was used domestically for lamps.

When settlement in Puget Sound created a market for cedar bark mats in the 1850's, the Makah imported the raw materials from Vancouver Island and wove mats for sale to the settlers.

Table 1. MAKAH TRADE AS RECORDED 1859-1866 BY JAMES G. SWAN

IMPORTS	EXPORTS
From Vancouver Island Nootkans	**To Vancouver Island Nootkans**
ocean-going canoes	dried halibut
yew paddles	
cedar house planks	dried herring eggs
painted tamanowas boards	dried blubber

wooden chests
water boxes

To Whites

pine bark blankets
dried cedar bark for making mats
alder, maple, and cottonwood masks
haliotis shell nose pendants
dentalium
medicine
dried salmon
dog fish oil
whale oil
dried halibut
smoked salmon
whale oil
dog fish oil
cedar bark mats
furs

From Quileute and Quinault

camas
pipe clay
ochre

From Clallam

bullrush and flag sleeping mats

Provenience Unspecified

grass mats
ash baskets

European Goods

blankets
guns
beads
pots
kettles
pans

Commerce with the whites was simply an extension of the aboriginal situation in which the Makah traded local products for items not available in Makah territory and in which the Makah imported goods specifically for export trade.

Marine products constituted the bulk of the export trade both to other Indians and to the whites. Considering the range and value of the native imports, it is clear that the Makah must have processed enormous amounts of

halibut, whale oil, blubber, and herring eggs. In addition to that which they consumed themselves and sold to other Indians in order to buy native goods, they produced a considerable surplus for sale to whites. In the September 11, 1852 issue of *The Columbian*, it is noted that 20,000 gallons of whale and fish oil had been purchased from the Indians at Cape Flattery that season.

In addition to the trade with other Nootkans, with Coast Salish, and with whites, there was considerable trade among the different Makah villages. Among the Makah, as with other Nootkans, ownership rights to important resource areas such as halibut banks, salmon streams, stretches of coastline, cranberry bogs and stands of cedar were inherited or acquired as marriage gifts. Such rights were extremely valuable. They were jealously guarded and were publicly validated and reaffirmed at potlatches and other ceremonials. Colson (1953:191) gives the Makah term for such rights as tupath. Drucker (1951:258) recorded the term topatl among Vancouver Island Nootkans for territorial rights which could be transferred at weddings.

Densmore (1939:3) gives this summary statement in a preface to her report on field work with the Makah in 1923 and 1926:

> The boundaries of the territory belonging to the Makah were clearly understood in the old days, this territory including both land and water. The old people valued the water more than the land and opposed fishing by other tribes of Indians. The Makah claimed the water of Puget Sound up to Port Crescent, thence by a straight line south to Swift Shore, beyond which were the whaling grounds; from Swift Shore the line went south to a place between Ozette village and the Quileute reservation, then straight from there to Ozette Lake and thence back to Port Crescent, this imaginary line encircling their territory. Within this tribal territory there was land and water which was owned by individuals and was a source of personal wealth. Some fishing places were better than others and were owned by wealthy men. The rule of inheritance was the same with a fishing or

> hunting ground as with personal property. The Makah even had shoreline rights, and if a whale came ashore on a man's shore-line it was regarded as his property. One advantage of the potlatch was that it gave the host an opportunity to describe the exact boundaries of his land, especially along the shore. Tracts of land with cedar trees were also valuable and were inherited in a family, the trees being used in making canoes. The land occupied by the Makah was Cape Flattery, bordering on the Pacific Ocean and the Strait of Juan de Fuca. They also claimed Tatoosh Island.

Trade among the Makah villages was important because strategic resources were to be found only in certain localities and only people with inherited rights to those resources could use them. Although the areas were said to belong to individual owners, in practice these were usually household heads whose housemates shared in usufruct rights.

People from Ozette and Waatch villages owned rights on the halibut banks northwest of Tatoosh Island. They used the island as a summer village and dried halibut and salmon there. Some of the Ozette people moved up to Ozette Lake in the latter part of the year to take salmon there. Inhabitants of the Neah Bay villages used Kiddekubut as their summer village and in the fall moved to camps up the Strait to take advantage of the salmon runs in the streams and rivers draining into the Strait.

Although halibut provided the mainstay of the Makah fish food, salmon were highly valued because they added variety to the diet and because it was possible to fish in the Strait and streams and lakes when ocean fishing was impossible because of weather conditions. People from Pacific coast villages who did not own fishing rights in the Strait area would trade halibut for salmon. People who owned rights in different salmon streams traded salmon for salmon in order to obtain several varieties. Not all streams provided the same species of salmon. The only sockeye available to the Makah were in Ozette River and Ozette Lake. Sockeye were highly desired for their flavor.

Dog salmon, or chum, were available in the Lyre and Hoko rivers. They were in demand because they are lean and have better keeping qualities and are more easily dried than salmon with more fat such as the coho which could be trolled for in the Strait throughout the year. Coho were eaten fresh; whereas chum were smoked for winter stores.

Gibbs mentions seeing dried salmon stored at Neah Bay during his visit at the treaty negotiations in January 1855. His notebook entry reads in part as follows:

> The houses at Neah bay are now (Jan. '55) on a much smaller scale than before the last visit of the small pox. * * * Each house is occupied by several families, their respective portions being separated by a partition of two or three feet high. A raised platform runs around them, on which the inhabitants sit, sleep and cook, above are shelves and poles on which their property is placed and a more miscellaneous assortment could hardly be found in a pawnbrokers — Seal skins full of oil, baskets of dried halibut and salmon, apparatus for whaling, paddles, piles of mats, articles from vessels wrecked on the coast.

The importance of the fall salmon fishery is documented by the fact that Makah and Clallam fought over fishing rights on the streams draining into the Strait of Fuca. James G. Swan made a canoe trip from Neah Bay to Port Townsend with Makah Indians in November 1859. The Makah told him that they had killed some Elwah (Clallam) Indians at a river called Clochudit which empties into Crescent Bay. This had occurred some years previous to his visit (probably shortly before treaty times) and resulted when the Elwha refused to let the Makah catch salmon in their river (Swan 1971:90).

The Lyre River is farther west than Clochudit and, according to T. T. Waterman, it also lies within Clallam territory. Waterman (Bureau of American Ethnology manuscript #1864) noted that the Makah owned some sort of fishing rights in that river.

> The next stream eastward has on our maps the curious name of Lyre River. I have no idea how this name arose. The stream is the outlet of a very fine

> body of water, inclosed by the Olympics, known as Lake Crescent. The name of the river in Indian is Ku hu bu, which term also I am unable to explain.
>
> The Makah had some sort of a claim which I do not understand to fishing rights on this river. They sometimes camped here in the autumn to take dog-salmon.

The distances between the Lake Ozette fishery, the halibut banks lying northwest of Tatoosh Island, and the Lyre River fishery illustrate why it was necessary for the Makah to range widely over their territory to utilize its varied resources. The fact that some of these resources, fall salmon runs, for example, became available at about the same time in different locales, made it profitable for groups of Makah to disperse in various directions, harvest the fish in their domain, and then to trade their surplus supplies.

The Makah were using a seine to take fall salmon on the Hoko River as early as 1866. In his diary record for September 25, 1866, Swan entered the following

> Captain John and others took the seine to Hoko today to fish for salmon.

Two days later, the diary mentions

> John returned from the Hoko with about 100 salmon which his party had taken in the seine.

Swan also mentioned an Indian giving him a salmon he had just killed at Sikiu River in November 28, 1859, but neither the species nor the method of taking is noted.

There are several entries in the diaries referring to spearing of salmon in Neeah brook in 1862. According to Swan this was an uncertain source of supply. He remarked on November 15, 1862

> Peter's Dick speared a fine salmon this morning some distance up the brook at Neeah. It was the dog tooth species. This is the first salmon I have ever known or seen taken in that brook although Indians tell me occasionally run up during the prevalence of high tides and freshets in the fall.

A month later salmon were still in the brook. Swan noted on December 17, 1862.

> Indians caught several salmon in the Neeah Brook this morning. They were of the dog tooth species.

The possibility of taking fresh salmon at Neah brook during November and December must have been a tremendous advantage for the people of Neah Bay. In the previous year Swan had noted tremendous surf at Neah Bay and on December 19, 1865 he remarked that it was more than a month since the Indians had caught anything but a few perch and rockfish.

While the taking of fall run salmon in the rivers was clearly of vital importance to the Makah, it is clear that most of their salmon were taken by trolling in the summer. Trolling areas were in the ocean, Strait and in Neeah Bay itself.

Gibbs commented in a notebook entry sometime between 1855 and 1857 writing of the Makah

> Each has his own trade. One set takes halibut, another salmon — a third whales alone — or at least this is in great measure the case — Salmon are taken by trolling (Summer Salmon) This fishery commences in May. They don't take many fall Salmon.

Swan's diary entries confirm the importance of the summer salmon fishery. For example, an entry dated June 28, 1865 notes the

> Indians very busy catching salmon off the entrance to the bay.

Of particular interest are his notations regarding the date of appearance of the large-scaled silver salmon or tsowtl. In 1863 they arrived about June 14 and in 1864 the spring or silver salmon started running August 4.

The Makah were able to take fresh fish for food in sheltered waters at almost any time during the year. Despite this, they harvested and preserved vast surpluses of fish to trade with other Makah, with other Nootkans, with their Coast Salish neighbors, and in historic times, with the whites. The Makah have always, as far back as knowledge about them goes, engaged in large scale commercial fisheries, as producers, processers, and traders.

TREATY NEGOTIATIONS

It is my opinion, based on my understanding of Makah culture patterns and on a reading of the available official documents, that the Stevens party and the Makah had quite different understandings of what was agreed upon at the Treaty of Neah Bay. The difference in understandings is directly attributable to two causes: first, the inadequacy of Chinook jargon as a medium of communication for treaty purposes; and second, mutual unfamiliarity with culturally different concepts of tenure and ownership rights. The Makah asserted property rights related to their fisheries which were not understood by the Stevens party and which the Indians thought were secured to them.

1. The language of communication

The Indians who were party to the treaty could neither read, write, nor speak in English. Since they were not literate in English their understanding of the treaty as a written document had to be conveyed verbally. Since none of the Makah spoke English, the adequacy of translation or interpretation is critical in evaluating how and what the Makah understood.

According to the official record of documents relating to the negotiation of the Treaty of Neah Bay, Governor Stevens and his party had the assistance of a Klallam Indian (Captain Jack) who spoke the Makah language. Klallam is a Salish language; Makah belongs to a completely different linguisitic stock called Nootkan. The order of difference between Klallam and Makah is like that between English and Finnish. Knowledge of one affords no help in understanding the other. We do not know how well Captain Jack spoke Makah nor do we know whether he communicated with the Stevens party in English or in Chinook jargon. The latter is more likely, but in either case, he then translated into Makah of which his mastery is of unknown quality.

The official record also states that two Makah signers of the treaty spoke Chinook. Chinook here refers to

Chinook jargon rather than the Chinook language spoken on the Columbia river. Chinook jargon was a pidgin or lingua franca used for trade purposes between Indians and whites or between Indians who spoke mutually unintelligible languages. Its limited vocabulary (a few hundred words) and simple grammar were adequate for trade and barter purposes, but utterly inadequate to convey foreign concepts of tenure and tenancy in a legal document such as a treaty.

Under the circumstances, it is important to know just how the written treaty was translated into Chinook jargon and interpreted to the Indians. Surprisingly, there seems to be no official record of the Chinook version of any of the treaties Stevens negotiated in western Washington. The official records do include a translation into Chinook by B. F. Shaw of a speech Governor Stevens gave in English at the Point Elliott Treaty and a speech made in Chinook by Shaw, who was the official interpreter at all the treaties in western Washington. Both of these Chinook texts convey very simple ideas of greeting and friendship and do not touch the real concerns of the treaty-making at all. They give little clue as to Mr. Shaw's mastery of Chinook jargon — which on the available textual evidence may have been minimal. If we had a record of the Chinook translation of any one of the treaties, it would be possible to demonstrate directly how inadequate the jargon was for the job. The official record, unfortunately, is silent. We are told merely that "The Treaty was then read to them, interpreted clause by clause and explained." I suppose an alternative test would be to ask the government to provide a Chinook text that could adequately convey the meaning of the treaties, a task I believe any competent linguist would declare impossible. Whatever was understood in Chinook then had to be translated into Makah.

2. Indian-white mutual unfamiliarity with foreign concepts of tenure and ownership rights

It seems clear to me that at the treaty negotiations the Makah asserted property rights which were not

understood by the whites because those kinds of rights were unknown to whites at that time. Even today these rights are known only to people who happen to be concerned with Nootkan ethnology.

At the time that the treaty was signed, no whites resided among the Makah and they enjoyed a reputation for being fierce and difficult. Part of this reputation was earned by their custom of seizing all goods and ships that wrecked on their coast and claiming them for their own. Worse yet, they equally seized and claimed as their booty any survivors of these ship-wrecks. This behavior was evidence to the whites of the cupidity and savagery of the Makah. Actually, it was the exercise of well-defined property rights among the Nootkan peoples (of which the Makah are the southernmost and only representative in the state of Washington).

We may discuss this perhaps as the law relating to ownership of flotsam and jetsam. From time immemorial the wastes of the Pacific have beat upon the shores of Cape Flattery bearing exotic treasures from unknown lands and distant ships. Throughout Nootkan territory on both sides of the Straits of Juan de Fuca, beach ownership was carefully demarked as to boundary lines. Where a village of several long houses was situated along the shore, each house-owner had ownership rights to anything the tides or waves deposited on his section of beach. Old men who were past their prime physically would station themselves on the beach propped up against a wooden backrest, or the wall of a house, and spend the day talking with their cronies, perhaps occupied at some sedentary task, watching the sea to call out and claim for the house-owner anything of value that drifted in with the tides. With the coming of the fur-trade and the voyages of exploration, ship wrecks occurred with increasing frequency off the northwest coast. The Nootkans simply carried on their age-old claims to whatever washed up on their beaches. Hence their view of ship-wrecked sailors as booty.

I suppose this kind of property right might belikened

to our notion of salvage rights. As I understand it, a ship adrift belongs not to the owner, but to the first vessel to get a line on her to tow her ashore. With the Nootkans, the issue was upon whose beach property the booty came to rest.

Stranded whales were a particularly valuable item which from time to time washed ashore. These might be whales which had been wounded at sea by a hunting party, but which had gotten away. They belonged not to the unsuccessful hunters, but to the owners of the beach on which the whale came ashore.

One of the Makah headmen tried to assert this property right at the treaty but he was not understood. According to the official record of the treaty proceedings, the headman, Tse-Kaw-wooth said that "If whales were killed and floated ashore, he wanted for his people the exclusive right of taking them. * * *" Governor Stevens replied by saying "Whoever killed the whales was to have them if they came ashore." The Governor's statement presents a clear case of cross-cultural non-communication.

Another kind of property right which the Makah asserted at the treaty talks relates to ownership of ocean tracts. In the official record of the treaty proceedings, one of the entries reads:

> *Tse-Kaw-wooth* - He wanted the sea - That was his country.

Tse-Kaw-wooth was the leading man of the Ozette village and was chosen by Stevens as head chief for the Makah at the time of the treaty. From later reports we know that the Ozette owned important fishing rights on the halibut banks northwest of Tatoosh Island. It seems likely that these were what Tse-Kaw-wooth was asserting rights to at the treaty.

Drucker (1951:247) has described Nootkan ownership concepts as follows:

> The Nootkans carried the concept of ownership to an incredible extreme. Not only rivers and fishing places close at hand, but the waters of the sea for miles offshore, the land, houses, carvings on a house post,

> the right to marry in a certain way or the right to omit part of an ordinary marriage ceremony, names, songs, dances, medicines, and rituals, all were privately owned property.

The Stevens party were familiar with the concepts of foreshore and riparian rights, but the notion of offshore rights comprising privately owned sections of ocean extending many miles from land was a foreign concept and one which the whites clearly did not comprehend at the treaty talks.

The boundaries of privately owned sea territories were described by reference by natural landmarks such as mountain peaks, points of land, islands, rocks, and so on. The Cape Flattery area and the Pacific coast extending south to Cape Alava provide a number of distinctive natural landmarks which the Makah used to define their sea properties. Waterman's maps 1 and 2 included with this report provide some idea of the number of named points along the shore and foreshore. In addition to these, Colson (1953:42) notes that:

> The mountains of Vancouver Island are used by fishermen as landmarks for locating the fishing grounds, and they bear Makah names know to the older men.

Drucker (1951:249) gives an example of how sea locations were marked:

> The area on the map was a favorite halibut fishing place in the former chief's territory. It was located by crossing two ranges, a north-south one formed by tsawunape (ts) and a prominent point on Nootka Cone (nc), and an east-west one formed by two peaks on Flores Island.

We do not have maps of the sea tracts claimed by the various Makah leading men at the time of the Makah treaty and apparently it is too late now to chart such information with any certainty. Nevertheless, it is clear that property concepts among the Makah agree in essence with those described in greater detail for the Nootkans across the Strait.

POST TREATY DEVELOPMENTS

In aboriginal times the Makah enjoyed a high standard of living as a result of their marine resources and extensive maritime trade. With the advent of Europeans to the area, new markets developed, Makah marine pursuits were intensified, and Makah wealth increased. The upswing continued until about 1870 when further developments reversed the trend.

Whatever the awareness of these latter four witnesses to the treaty, I am confident that the four men who were actively involved in the negotiations understood the commercial value of the Makah fishery and the extent of Makah trade with whites.

I am less certain about the extent of knowledge held by these men regarding Makah trade with other Indians. Simmons and Shaw must have known in a general way, but possibly did not appreciate the full role of this trade by Makah surplus of marine resources to other Indian groups. Gibbs refers to Makah trade with Vancouver's Island in that same 1854 report submitted through McClellan to Stevens, but it is unclear whether he means trade with Indians on Vancouver Island or trade with the Hudson Bay Company at Victoria. Both, of course, took place and whichever he meant, it is evidence of a commercial and trade value to the Makah.

In sum, I am convinced that the treaty negotiators appreciated and were aware of the extensive and lucrative trade carried on by the Makah based solely on their marine resources. They were undoubtedly more aware of that aspect of the trade in which whites were involved, than of that exclusively among Indians. The part of the trade which was with whites was in itself sufficient to impress the governor and his party.

(b) Stevens found the Makah not much concerned about their land, apart from village sites, burial sites, and certain other locations, but greatly concerned about their marine hunting and fishing rights. Much of the official record of the treaty negotiations deals with this. Stevens found it necessary to reassure the Makah that the

government did not intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits. I can only interpret the language as promise of economic aid for commercial development. According to the records of the proceedings of the treaty commission,

> (Tuesday, January 30)
>
> Gov. Stevens informed them that so far from wishing to stop their fisheries, he intended to send them oil kettles and fishing apparatus.
>
> (Wednesday, January 31)
>
> * * * * The Great Father * * * knows what whalers you are, how you go far to sea to take whales. He will send you barrels in which to put your oil, kettles to try it out, lines and implements to fish with.

The treaty party landed at Neah Bay on the evening of Monday, January 29th. The record does not indicate that any discussions about the treaty took place the first evening. Discussions are reported on the Tuesday and the Wednesday. On the latter day the treaty was signed. On both the Tuesday and the Wednesday, Governor Stevens promised the Makah equipment to develop their oil extracting and fishing industries. I remarked earlier that, in my opinion, these promises can only be seen as related to commercial development. Why else would the Makah require barrels to put up the oil? They had watertight wooden boxes as well as other native containers for storage of oil meant for home consumption. Why would they need kettles to try out the oil, lines and fishing apparatus? As we have seen, the Makah had an intensive pre-treaty marine economy and an extensive trade based squarely upon it. The only conceivable inducement that Stevens' promises at the treaty ground could offer was in terms of increased efficiency and expansion of this commerce. In this connection we may take note of a separate but related point. Governor Stevens' promise of kettles and fishing apparatus makes it clear that there was no intent that the Indians be restricted to aboriginal equipment and techniques.

* * *

EXCERPTS
from the
Findings of Fact
of the
Indian Claims Commission
in
The Snoqualmie Tribe of Indians
vs
United States

May 7, 1965

(Exhibit G-17(O))

FINDINGS OF FACT

The Commission makes the following findings of fact.

1. The petitioner herein, the Snoqualmie Tribe of Indians, is an identifiable group of American Indians having the right and capacity under the Indian Claims Commission Act to bring and maintain this suit on its own behalf. (60 Stat. 1049)

2. Along with numerous other Indian tribes and bands, the Snoqualmie Tribe of Indians participated in the Point Elliott Treaty of January 22, 1855 (12 Stat. 927). Under this treaty of cession, the Snoqualmie Tribe of Indians relinquished to the United States all right, title, and interest to a certain portion of the overall area ceded by all tribal participants. The particular tract now claimed to have belonged aboriginally to the Snoqualmie Tribe of Indians, the petitioner herein, was described by and large in the original Snoqualmie petition as being situated in the watershed area of the Snoqualmie River from its headwaters to its mouth.

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6. While notable cultural distinctions can be drawn among many of the tribes and bands that lived along the rivers, streams, and shores of northwestern Washington, eye witnesses to the events of 1850 point to one common

cultural characteristic among all groups. We find an almost universal and paramount dependence upon the products of a marine economy to sustain the tribal way of life. Indeed, fishing and its collateral pursuits were of prime necessity, while hunting and gathering activities for the most part were of secondary importance. The historical, scientific, and other reports concerning this period generally indicate an abundance of marine products that are readily available to the native inhabitants.

In 1853, shortly before he was to treat with the many Puget Sound tribes, Governor Stevens made the following general observation on the way of life of these Indians.

> All these tribes live on the different water courses; or the bays & Inlets of the Sound, subsisting on Roots & Berries, and the various species of fish which abound in the waters. But few of these Indians ever leave this basin, but roam about the Sound leading for the most part an idle life. They have all, however, singled out a few spots in their domains, which, they wish to reserve; and contemplate the sale of the rest of their lands to the whites. These spots are not only permanent places of residence, but, are hereditary. Near them are the graves of their relatives and friends and they cherish an affection for them, which, I have scarcely ever seen equalled. Those are their homes, and from them they roam about the Sound in every direction, going where the fish Roots & berries abound most at the different seasons of the year." (Def., Ex. 73)

The topographical features of the land away from the rivers and streams contributed to the Indians' need to engage in fishing as their principal means of subsistence. The adjacent land was quite fertile, but the heavily wooded areas proved difficult to penetrate. What animals that were taken in hunting for the most part included the deer, elk, or bear that had descended from the higher elevations to the river beds for water. The tribal fishing rights were of such importance to these northwest Indians, that invariably their rights to continue fishing at the usual and accustomed places were explicitly spelled out in many of the treaties of cession under which they relinquished their aboriginal rights.

Article 5 of the 1855 Point Elliott Treaty contains the usual and customary language followed by the treaty makers of this period, and it reads as follows:

> "Article 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, * * *." (Art. 5, 12 Stat. 927)

7. Most of the authorities familiar with the tribal activities of the Snoqualmie and Skykomish Indians during the mid 1800's pictured them as living along the Snoqualmie and Skykomish rivers in separate and extended villages. There they subsisted primarily by fishing, and incidentally by hunting and root gathering, with some effort toward farming a potato patch.

* * *

POST 1974 DECISION; MOTIONS, ORDERS, INJUNCTIONS, FINDINGS AND DECISIONS IN U.S. V. WASH. (U.S. DIST. CT. # 9213)

Motion for intervention of Purse Seine Vessel Owners Association

March 15, 1974

Intervenor Purse Seine Vessel Owners Association alleges:

I.

Purse Seine Vessel Owners Association is a Washington Corporation composed of 175 owners and/or operators of purse seine fishing vessels who commercially fish for salmon within the waters of the State of Washington.

II.

The Final Decision of this Court, filed and entered on February 12, 1974, will have an adverse effect on the interests of intervenors, in that the livelihood of intervenor's members will be substantially impaired because harvestable salmon previously available to said members will be substantially reduced in the future.

III.

This Court has retained continuing jurisdiction of this controversy, and further proceedings are anticipated which will also have a substantial effect on the opportunity of intervenor's members to earn a livelihood.

IV.

Intervenor meets the requirements of FRCP Rule 24(a) "Intervention of Right", which provides in part:

> "Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

(1) Intervenor's members have an interest in the property (privilege of fishing of salmon commercially) which is the subject of the action;

(2) Their ability to protect such interest will be impeded by commercial fishing restrictions which may be adopted by this Court as recommended by plaintiffs; and,

(3) The State Department of Fisheries cannot adequately represent the interests of these members since said Department represents competing fishing interests relating to the taking of salmon, such as the sport fishery and that of other commercial gear which is in competition with the fishing gear used by intervenor's members. Intervenor, therefore, feels that it should be given the opportunity to speak for itself, rather than rely on a spokesman who must also represent its competition.

V.

In its Final Decision, this Court stated its desire to have all interested parties before the Court so that their views could be heard and considered. Intervenor believes that its present status as amicus curiae does not give sufficient opportunity for meaningful participation in the further proceedings before the Court, particularly in view of the fact that any regulations concerning commercial net fishing which may be subject to the approval of this Court will directly affect the interests of intervenor's members.

/s/ _____
JOSEPH T. MIJICH
Attorney for Intervenor-defendant
Purse Seine Vessel Owners Association

U.S. v. WASHINGTON

District Court: No. 9213

RULINGS ON POST DECISION MOTIONS

March 22, 1974

Following entry of Final Decision #I (FD#I) on February 12, 1974 a number of motions for reconsideration and other purposes were served and filed. After briefing, all pending motions were heard on oral argument March 5, 6, 18, 19 and 20, 1974. During argument, oral and tentative rulings were made on a number of said motions and ruling on others was deferred for further consideration by counsel and the court. The court fully reviewed all the proposals of counsel pertaining to said motions, and having considered each motion this order is entered as formal and final ruling on each and all of said motions.

1. **Motions of Northwest Steelheaders Council of Trout Unlimited and Purse Seine Vessel Owners Association to intervene as parties defendant.**

The motions of these organizations to change their status from amicus curiae in this litigation to intervenor defendants is found by the court to be untimely and unnecessary in each instance because their interests have been and will continue to be adequately represented by the State of Washington, its Game Commission and Fisheries Department and their counsel and therefore each of said motions is hereby denied. Both organizations may continue to act as amicus by serving and filing briefs, both in this court and on appeal, and in any proceeding in this court during appeal. Either of said amici may apply for permission to participate in some other particular in any future specific proceeding.

2. **Washington Reef Net Owners Association's motion to amend or make new Findings, Conclusions and Judgment.**

The court finding said motion without merit in all particulars, it is hereby denied.

3. **Yakima Nation's motions for (a) Reconsideration of FD#I re state power to regulate federal treaty right fishing and (b) for approval of self-regulating status.**

Motion 3(a) was heard, considered and denial thereof is hereby confirmed. Motion 3(b) is granted subject to adoption of a regulation by the Yakima Nation comparable to that filed with the court by the Quinault Tribe on 3/18/74.

4. **Quinault, Makah, Lummi and Quileute Tribes' motion re adjudication of allocation of propagated and natural fish.**

The court has jurisdiction to adjudicate such issue in this case but hereby reaffirms the ruling stated in FD#I providing for initial adjudication by state courts.

5. **Lummi tribe motion for post FD#I order re Lummi reef net fishing.**

The parties involved have reported to the court that they are near reaching an agreed solution. Therefore, ruling on this motion is deferred, subject to reconsideration when the parties submit their final report.

6. **Fisheries' motion for reconsideration.**

This motion includes a considerable number of written questions submitted during argument. Each particular question presented has been considered and in some instances oral ruling was made thereon. Rulings on all questions posed by Fisheries are specified in Exhibit "A" attached hereto and by this reference are hereby made a part hereof. Said rulings are hereby confirmed as the formal and final order of said motion in each and all particulars.

7. **Game's motion for clarification and amendment of Final Decision #I.**

The oral decision on 3/6/74 holding that treaty right fishermen may sell or otherwise deal commercially with steelhead taken per tribal regulations at usual and accustomed places is hereby affirmed. The motion is otherwise denied, except as provided in the rulings on the Fisheries' motion.

8. **Motions for attorneys' fees and costs.**

By agreement these motions will be heard and determined at an early date following briefing on a stipulated schedule.

Exceptions to any of said rulings by any party aggrieved thereby is hereby noted.

IT IS SO ORDERED.

Upon entry hereof the Final Decision #I and the Declaratory Judgment and Decree entered herein 2/12/74 become unreservedly final and reviewable as provided by 28 U.S.C.A. 2201.

Dated this 22nd day of March, 1974.

/s/ _____
GEORGE H. BOLDT
Senior United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ORDER

July 18, 1974

The Court having heard oral argument on June 28, 1974, and considered written submissions previously made by the parties on matters considered at said June 28 hearing,

IT IS HEREBY ORDERED:

1. The Motion of the Swinomish Indian Tribal Community to intervene as an additional Plaintiff in this matter and to file its proposed Complaint in Intervention dated April 22, 1974, is granted.

2. The Motion of the Tulalip Tribes of Washington to intervene in this matter and to file its Complaint in Intervention dated May 23, 1974, is granted except as to the Cross-claim against the United States and the State of Washington. Decision on the right to file the Cross-claim is reserved for later determination.

3. The Motion of the Suquamish Indian Tribe to intervene as an additional Plaintiff herein and to file its Complaint in Intervention dated May 31, 1974, is granted, subject to the other provisions of this Order.

4. The Motion of the Port Gamble Band of Clallam Indians filed June 7, 1974, to intervene as an additional party Plaintiff to this action for the purpose of asserting its claims as set forth in its Proposed Complaint in Intervention attached to said Motion is granted except as to those portions of paragraphs numbered 25 through 29 of the Proposed Complaint which relate to matters other than the regulation or limiting of fishing by non-Indians. Decision on the right to file the excepted portions of the Complaint is reserved for later determination.

5. The granting of all of the foregoing Motions to Intervene is subject to the further express limitation that nothing in this Order shall be deemed to constitute revision or modification of any portion of the Final Decision No. 1 of this Court and of the related Orders, Judgments and Decrees heretofore entered in this matter and nothing in this Order shall entitle any of said Intervenor-Plaintiffs to reopen any matter previously determined in said Final Decision, Findings of Fact, Conclusions of Law, Orders, Judgments and Decrees and said Intervenors shall be bound by all such determinations except as the same may be subsequently modified or set aside on appeals previously filed in connection therewith. Each of said Intervenor-Plaintiffs shall, prior to filing its actual Complaint in Intervention, conform said Complaint to the limitations set forth in this Order.

6. The Motion of the Washington State Commercial Passenger Fishing Vessel Association to intervene in this matter is denied without prejudice to the right of said

Association to file such a Motion subsequently after first seeking relief through the courts of the State of Washington.

7. Until further Order of this Court after a full hearing to be held at the earliest possible date upon request of any party hereto, regulations adopted by the International Pacific Salmon Fisheries Commission shall be presumed to be controlling with respect to fishing by any treaty tribe or its members and the Defendants may enforce the provisions of said regulations as incorporated in the regulations of the Defendants against members of such tribes.

Dated this 18th day of July, 1974.

/s/ _____
GEORGE H. BOLDT
Senior United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MEMORANDUM DECISION ON PLAINTIFFS' REQUEST FOR DETERMINATION AND INJUNCTION

September 12, 1974

In *United States of America, et al. v. State of Washington, et al,* this court, at the instance and with approval of counsel for all parties, assumed jurisdiction over all matters adjudicated in Final Decision #I relating to Indian treaty fishing rights in the case area and other related matters. Following a lengthy and extensive trial, during which there was recorded in evidence voluminous and detailed information concerning many aspects of Indian treaty fishing, this court rendered what is designated as Final Decision #I. That decision included specific Findings of Fact and Conclusions of Law regarding the historical and biological facets of Indian treaty fishing rights; it also specifically defined the extent of those Indian treaty rights as well as the privileges and

obligations of non-Indian fishing and the control thereof by the State. Recognizing that the appellate procedures in this case will certainly take up to two years or longer, the court and all counsel agreed that procedures were required to deal with the many important questions concerning fish runs and seasons that would take place before a Circuit or Supreme Court decision would finally determine all issues adjudicated in Final Decision #I. For these reasons, the court retained continuing jurisdiction over all such matters, including development of an interim program for implementing some of the essential provisions of Final Decision #I, subject to certain limitations accepted and approved by counsel for all parties.

Paragraph 5 of the Interim Plan and Stay Order entered by this court on March 22, 1974 obligates defendants State of Washington, Washington Department of Game, and its Director, Carl Crouse, Washington Department of Fisheries, and its Director Thor Tollefson (hereinafter "defendants") to make significant reductions in the non-Indian fishery as deemed necessary to achieve the objectives of the court's definition of Indian treaty fishing rights. In carrying out this order the court anticipated that defendants would promulgate and enforce regulations reducing the non-Indian fishery. Defendants have promulgated certain regulations establishing reductions in the non-Indian fishery, but have been unable to enforce them by reason of certain directives and orders of the Thurston County Superior Court in *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, No. 50370, *Washington Kelpers Association v. Tollefson*, No. 50552, and *Puget Sound Gill Netters Association v. Tollefson*, No. 50757.

At the hearing 9/2/74 on Plaintiffs' Request for Determination and Injunction, the court directed defendants to advise the court not later than September 6, 1974 of any alternative means or methods of regulation which the defendants could propose to effect the required "significant reductions" in non-Indian fishing. By response received by this court on September 6,

> "* * * defendant Department of Fisheries has concluded that the regulatory enactments promulgated by it in response to and in good faith compliance with this Court's Final Decision No. 1, of February 12, 1974, and the Interim Plan and Stay Order of March 22, 1974, were correct and appropriate actions to take."

No additional or alternative regulations were or have been proposed by defendants. Therefore, it now appears that in order to effectuate the prior orders of ths court, and to preserve its jurisdiction over the subject matter, further orders of this court are necessary to clarify the scope of jurisdiction assumed by it and the duties imposed upon defendants under Final Decision #I.

The principal questions presented by plaintiffs' request are whether this court is empowered to protect its earlier rulings from incursions such as have taken place in the three state court proceedings referred to above and, if such jurisdiction exists, whether this court in its discretion should exercise said authority, and if so, in what form. This court fully adopts the legal arguments recited on pages 5 through 16 of "Plaintiffs' Request for Determination Regarding Relaxation of Restrictions on Non-Indian Fishing" as if set forth fully herein (copy attached hereto) Exhibit "A"; and refers particularly to the following cases: *Atlantic Coast Line; Thomason; Shelton; Donelon; Leiter Minerals, U.S. v. Wood; Alonzo v. U.S.* Based upon the legal arguments and decisions referred to immediately above, this court is not only satisfied that it has jurisdiction to enjoin the state court proceedings referred to, within the express exceptions to the anti-injunction statute, 28 USCA § 2283, but also believes it has an urgent duty to take such action to the extent shown necessary in order to effectuate its judgment and protect the federal treaty rights declared therein.

It is clear beyond reasonable question that the three state court injunctions referred to above have to some extent prevented defendants from complying with this court's order to make "significant reductions" in the non-Indian fishery in order to make available to treaty

right fishermen a sufficient portion of the harvestable resource to guarantee an opportunity for them to harvest 50% of said resource. Interference with the exercise of Indian treaty fishing rights indisputably is within the jurisdiction of this federal court, and state court proceedings instituted by non-parties to this law suit cannot be allowed to frustrate either final determinations based on exhaustive research and evidence or the jurisdiction of this federal court.

Data submitted by the United States Fish and Wildlife Service (copy attached hereto), Exhibit "B" which includes Department of Fisheries statistics, indicate that through August, 1974, with the exception of the Nisqually River chum harvest in January which for management purposes would be considerd part of the 1973 run, Indian fishermen in the case area in 1974 have caught less salmon of each species than they caught in 1973, both in terms of total numbers of fish caught and in terms of the percentages of Indian harvest as contrasted with total non-Indian commercial harvest. Estimates indicate that through August, 1973, Indians had taken 123,370 salmon, or 3.5% of the total as compared with 3,404,710 salmon harvested by non-Indian commercial interests; through August of this year, Indians have harvested 89,402 salmon, or 2.4% of the total as compared with 3,628,513 salmon harvested by non-Indian commercial fishermen; when the sport catch through August of 1974 of 837,099 salmon is included, the Indian share of the total harvest is 2.0%.

These figures illustrate in the most startling manner the gross inequities between Indian and non-Indian harvest, and the complete failure and inability of defendants to comply with this court's orders to make significant reductions in non-Indian fishing and to afford to Indians an opportunity to catch approximately 50% of the harvestable resource at their usual and accustomed grounds and stations. Because by their nature substantial fish resources will be lost for this year to plaintiff tribes if not harvested during the currently ongoing seasons, the immediate threat of substantial economic harm and

serious hardship to many treaty right fishermen convinces this court that prompt action is required to protect federal treaty rights that this court has found are constitutionally guaranteed as the law of the land and to assure the viability of this court's Final Decision #I, unless and until it be modified or reversed.

In all court litigation in which the United States has an interest, including cases involving the interpretation and application of treaties duly enacted as required by federal law and the national Constitution, the Attorney General of the United States, acting through the Justice Department and United States Attorneys, is the official authorized to speak and act for the people of the nation in such matters. In this instance, the United States Attorney, presumptively in the national interest has requested that this court enjoin enforcement of the injunctions issued in all three of the above referred to state court proceedings. Plaintiff tribes, as descendants of signatories to treaties with the United States, have joined in that request.

Rather than consider the state court proceedings in toto, upon the record now presented this court finds it necessary to consider the injunctions separately and therefore will discuss each of them in the order of issuance. It must be recognized, however, that each of the three state court proceedings was instituted by litigants none of whom was a party to this federal court action. Additionally, none of those state court proceedings joined the United States or the plaintiff tribes, the real parties in interest who could be, if not irreparably, at a minimum grievously, injured by state court injunctions preventing enforcement of the Department of Fisheries regulations promulgated for the express purpose of making more fish available to treaty right fishermen. Finally, at none of the state court hearings were witnesses interrogated nor was any of the hearings a full scale evidentiary hearing; only affidavits of the litigants were presented, not subject to cross examination, and the state court judges could only act upon the materials presented to them.

Beyond question, the state court judges who issued

the restraining orders involved herein performed their judicial functions in accordance with established law and practice in the state courts, and in an able and responsible manner beyond criticism in any particular whatever. However, it is clear from the cited authorities that the circumstances above recited can and should be considered by this court together with the full record before it, significant portions of which were not available to the state courts, in determining what action if any to take with regard to these state court proceedings.

(1) In the *Commercial Passenger Fishing Vessel* case, plaintiffs therein obtained a temporary injunction preventing enforcement of a Department of Fisheries regulation reducing the personal use salmon angling daily bag limit in Washington coastal waters and the Strait of Juan de Fuca from three salmon to two salmon. The record herein shows that representatives of some plaintiff tribes opposed enactment of this regulation by the Department of Fisheries, on the ground that such reduction in non-Indian fishing would not to any appreciable extent achieve its stated purpose to make more fish available for harvest by plaintiff tribes in the case area, because the runs of fish to which that regulation applied would return almost entirely to the Columbia River and its tributaries for spawning. Upon the evidence before it, this court finds that plaintiffs herein have not sustained their burden of showing that enforcement of that regulation reducing the daily salmon sport bag limit would achieve the purpose of making a significant number of additional fish available for harvest by treaty right fishermen. For these reasons, this court finds no reason to interfere with the state court temporary injunction currently in effect in cause No. 50370.

(2) In the *Kelpers Association* case, plaintiffs therein succeeded in temporarily enjoining enforcement of a Department of Fisheries regulation which effectively closed commercial trolling for salmon within the three mile limit under state jurisdiction. Evidence in the record before this court discloses that the total harvest by the

Kelpers Association within the three-mile limit is not substantial and that the runs of fish involved treaty right fishermen because they pass through other non-Indian commercial fisheries before reaching tribal fishing grounds. Upon the evidence before it, this court finds that plaintiffs herein have not met their burden of showing that enforcement of the regulation in question, proposing to close commercial trolling for salmon within the three-mile limit, would achieve the purpose of making a significant number of additional fish available for harvest by treaty right fishermen. For these reasons, this court finds no reason to interfere with the state court temporary injunction currently in effect in Cause No. 50552.

(3) In the *Gill Netters Association* case, plaintiffs therein obtained a temporary injunction enjoining enforcement of a Department of Fisheries regulation proposing reductions in fishing time for gill netters and purse seiners in the Puget Sound marine fishery. Unlike the evidence concerning the prior temporary injunctions, the record in this case is replete with factual data which establishes beyond reasonable question that very significant portions of the harvestable fish not taken by the non-Indian fishermen referred to would reach the usual and accustomed off-reservation fishing grounds of plaintiff tribes in substantial numbers. Plaintiffs herein have overwhelmingly met their burden of proof to show that enforcement of this proposed Department of Fisheries regulation calling for reduced fishng time for gill netters and purse seiners in Puget Sound would achieve at least partial compliance with this court's directives to make additional fish available for harvest by treaty right fishermen, and that prohibition by the state court of enforcement of that regulation presents an immediate threat of substantial economic harm and serious hardship to plaintiff tribes.

Upon the facts found as above stated and after most serious and meticulous consideration of written memoranda and oral arguments by all parties and written submissions by parties to the state court actions and by

the state court judges of Thurston County, this court finds and holds that injunctive relief in the form set forth below must issue to enjoin enforcement of the state court injunction in Cause No. 50757 as follows:

INJUNCTIONS

(1) For the reasons hereinabove stated, unless and until this court orders otherwise, it is now hereby ORDERED AS FOLLOWS:

That the Superior Court of the State of Washington, County of Thurston, is hereby prohibited and enjoined from in any manner or to any extent enforcing the temporary injunction issued by said court on August 30, 1974, in *Puget Sound Gill Netters Association v. Tollefson,* No. 50757, and from issuing any other order in said cause which in effect will prevent the Department of Fisheries from fully enforcing the regulations in question adopted pursuant to Administrative Order No. 1143.

This injunction shall in no manner whatever preclude said court from expeditiously proceeding with preparation and trial of the issues presented in said cause.

(2) IT IS FURTHER ORDERED:

That defendants, State of Washington, Thor Tollefson, Carl Crouse, Departments of Fisheries and Game of the State of Washington, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them, shall not obey, carry out, enforce or otherwise treat as having any lawful force or effect the order of the Thurston County Superior Court for the State of Washington referred to in paragraph (1) above.

Federal Rule of Civil Procedure 65(c), pertaining to security necessary for issuance of injunctions, provides in part: "No such security shall be required of the United States or of an officer or agency thereof." The application for injunctive relief herein having been made by the United States, this court may not require security therefor from the United States, and does not require such security from any parties joining in or supporting said application.

IMPLEMENTING ORDERS

For reasons not clear to this court, the Department of Fisheries takes the anomolous position of opposing entry of the injunction issued above, while asserting the correctness and appropriateness of the regulations enjoined in the state court proceedings. This court's injunction confirms the propriety of the Department of Fisheries regulations adopted pursuant to Administrative Order No. 1143. Moreover, this court has not and will not direct, limit or in any manner whatever interfere with full exercise of the prerogatives, duties and discretion vested by state law in the Directors of the Departments of Game and Fisheries, excepting to the extent necessary to enforce the judgment and decree entered pursuant to Final Decision #I and to restore or preserve the Indian treaty rights specified therein. Nothing in this Decision or in the above injunction should be construed or applied to the contrary.

However, due to the circumstances previously recited, and to aid in achieving an equal opportunity to both Indian and non-Indian fishermen to harvest fish in the case area and to compensate treaty right fishermen for not having been able to harvest the fish resource to the extent determined by Final Decision #I, this court finds it necessary in aid of its jurisdiction and to protect and effectuate its judgment, to provide as follows:

IT IS HEREBY ORDERED THAT:

(1) The defendants are required to make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the court's Final Decision #I without requiring mathematical precision, but in making such reductions shall do so consistent with the concept of permitting the full harvest of fish.

(2) Reductions in the non-Indian fishery, once adopted by the defendants in accordance with the court's prior rulings and this order, shall not thereafter be relaxed or rescinded without prior notice to this court and all parties to this action, unless consent of the affected plaintiff tribes has been obtained prior thereto.

(3) To the extent reduction in the non-Indian fishery adopted in accordance with the court's prior rulings already have been relaxed or rescinded prior to the entry of this order by reason of the temporary injunction of the Thurston County Superior Court in *Puget Sound Gill Netters Association v. Tollefson*, No. 50757, issued August 30, 1974, defendants shall cease immediately from carrying out directives, orders or policies in accordance with said temporary injunction and shall resume forthwith to implement the regulatory schemes and policies previously adopted to effect reduction in the non-Indian commercial net fishery for salmon on Puget Sound and related waters.

(4) At the earliest practicable date, and in no event later than September 23, 1974, defendants shall report to the court or its Master on the consequences of the relaxation of its earlier reductions in the non-Indian fisheries by reason of the temporary injunctions of the Thurston County Court. This report shall include the best available estimated numbers of fish which the plaintiff Indian fishermen were prevented from taking by reason of said temporary injunctions, and proposals to be implemented immediately to make available to Indian fisheries on a compensatory basis numbers of fish approximately equivalent to those lost by reason of said temporary injunctions. Defendants shall attempt to implement such proposals prior to the expiration of the time required for the submission of this report to the court if such action is necessary to ensure that the Indian treaty fishermen will have the opportunity to take additional numbers of fish in compensation for those lost by reason of the three state court temporary injunctions. Nothing in this order shall preclude defendants from taking any immediate action to reduce the non-Indian fishery in order to enhance Indian opportunities to take fish at their usual and accustomed places.

(5) If, at any time subsequent to the entry of this order, defendants are participants in legal proceedings which, in their judgment, might possibly result in an order

that could impair or otherwise affect adversely their ability to conform to the requirements of this court's Final Decision #I, or other orders in this case, defendants shall immediately so inform this court and shall serve upon all parties to this action copies of all papers filed in such legal proceedings.

(6) Defendants shall take such action as may be necessary to notify forthwith their officers, agents, employees, and attorneys, and those persons in active concert or participation with them, of the content of this order and the duties and obligations defined herein.

IT IS SO ORDERED, ADJUDGED AND DECREED, effective immediately upon entry hereof this 12th day of September, 1974.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. vs. WASHINGTON

District Court: No. 9213

ORDER FOR PROGRAM TO IMPLEMENT INTERIM PLAN

October 8, 1974

IT IS HEREBY ORDERED that the following program is approved as an initial program to implement the Interim Plan approved by this court on March 22, 1974.

It is recognized that this program is subject to modification and further refinement as additional information and further experience become available. The parties will continue to develop such information and experience and will consult frequently with each other on general and specific problems or conditions in an effort to achieve more completely and as rapidly as possible full compliance with the spirit and objectives of the Orders of March 22, 1974. Any modifications or refinements agreed to by the affected parties shall become effective upon filing

with the court without further action or approval of the court unless such further action is specified therein. Any party may submit requests for other modifications or refinements for approval or other appropriate Order by the court.

Tribes having qualified for self-regulation are not bound by the particulars of this program, other than as directed by the terms of Final Decision #1 and the Injunction entered pursuant thereto.

IMPLEMENTING PROGRAM

A. Guideline Principles for Regulating Fisheries.

Guideline Principles for Regulating Fisheries pursuant to Paragraph 2 of the Interim Plan and Stay Order shall be filed with the court no later than October 4, 1974. If agreement has not been reached to those principles for regulating fisheries, they shall be submitted to the Expert and Master for determination of those to be implemented.

B. Exchange of Information Preliminary to Regulation.

Data required to be furnished by the state agencies under Paragraphs 17 and 18 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order and data required to be furnished by the tribes under Paragraph 17 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order shall be furnished at the earliest practical time after such data becomes available, but no later than the following schedule:

1. At least sixty (60) days prior to entry of a run into the first fishery subject to state control run size predictions, numbers of harvestable fish set pursuant to Paragraph 17 of the Injunction and information concerning run size, timing and condition requested by the tribes pursuant to Paragraph 18 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order shall be furnished by the state agencies.

Until such time as predictions of steelhead run size

are possible, Game shall determine the harvestable portion of the run in the best manner practicable, after consulting with the plaintiffs to receive their suggestions. Such predictions relating to harvestable numbers of fish shall be subject to review if the tribes believe there is better information from another source. If the parties cannot agree on the best source, the court shall make a determination through the Master in consultation with its Expert advisor. All predictions of harvestable numbers shall be further subject to review during the fishing season as additional information is obtained.

2. At least fifty (50) days prior to the entry of a run into the first fishery subject to state control, the tribes shall furnish information concerning their anticipated fishing activity as requested by the state under Paragraph 17 of the Injunction.

3. At least forty-two (42) days before a proposed opening of fishing, the state agencies and tribes shall exchange proposed off-reservation fishing regulations affecting the particular fishery.

4. At least twenty-one (21) days before a proposed opening, regulations shall be adopted and filed pursuant to Paragraph 1 of the Interim Plan and Stay Order; *provided* that the time periods under Paragraphs 3 and 4 above shall not be applicable to regulations filed prior to September 15, 1974; *provided further* that for such latter regulations filed after the date of this order at least seven (7) days notice of such regulation shall be given before a fishery is opened; and *provided further* that emergency regulations are enforceable upon filing them with the court and service upon the other parties affected of a copy of such regulations and a statement of the facts and circumstances of the emergency on which the regulation is based. Any party may respond and seek immediate review. Requests for emergency consideration by the court will be given priority and determined rapidly.

The 1974 Puget Sound coho fishery shall be apportioned according to the principles in the Interim Plan. It is recognized that there is not sufficient time

available to adhere to the schedule of information exchange specified in the plan. Therefore, on Monday, September 30, 1974 at 9:30 a.m. Fisheries and the plaintiffs shall meet with the Master in an attempt to reach agreement on the numbers of harvestable fish to be divided.

C. **Limitation on Harvest.**

Whenever such closure or curtailment will (1) increase the opportunity of the other fishery (i.e., non-Indian or Indian, respectively) to take more of the harvestable portion of such run, and (2) not result in overescapement for such run, the Department of Fisheries will close or curtail the non-Indian fisheries on any run of salmon when the non-Indian catches reach or are expected to reach 50% of the harvestable portion of that run. That Department may likewise close or curtail Indian off-reservation commercial fisheries on said run whenever those fisheries have taken 50% of the harvestable portion of said run. The Department of Game may close or curtail the Indian off-reservation steelhead commercial fisheries or the non-Indian sport fisheries, respectively, on any river system steelhead run whenever such fisheries have taken 50% of the harvestable portion of said run. For purposes of this Paragraph the harvestable portion of the run shall be the number determined by the Department of Fisheries for salmon or the Department of Game for steelhead and supplied in accordance with Paragraph B.1. above.

D. **Identification of Indian-Caught Steelhead.**

The parties agree that it is desirable to develop mechanisms for assuring that steelhead other than those lawfully taken by Indian treaty fishermen do not enter commerce contrary to state law. The tribes and the Indian Fisheries Commission shall coordinate efforts with the Department of Game to develop a plan for meeting the objectives of preventing unlawfully caught non-Indian fish from entering commerce and providing a means for catch reporting and shall submit their joint recommendation to the Court by November 1, 1974, for the Court's

consideration and/or official tribal and Department of Game action.

E. **Catch Data.**

1. Commercial catch reports shall be made by non-state licensed Indian fish buyers on forms (fish tickets) provided by the state agencies, except for the Quinault Indian catch which may be made on tribally issued fish tickets. Indian fish buyers will submit a copy of such fish tickets daily to the Northwest Fisheries Program Office of the U.S. Fish and Wildlife Service which shall communicate to the applicable state agency by a copy of the fish ticket or otherwise data concerning the total catch by species, area of catch and tribe before the close of business of the day on which such reports are received. Copies of fish tickets reporting Indian catch purchased by state-licensed fish buyers shall be made available to the Northwest Fisheries Program Office of the U.S. Fish and Wildlife Service by the state agencies within one day of the date that such reports are received.

2. For each run of fish the state agencies shall provide the Northwest Fisheries Program Office of the U.S. Fish and Wildlife Service or to the tribes summaries of the non-Indian commercial catch no less than weekly and sport catch biweekly.

F. **Determination of Tribal Treaty Status and Fishing Areas.**

The defendants shall not, with respect to any Indian tribe or group which has not specifically been determined by this court to be entitled to an interim or permanent basis to be recognized as a treaty tribe, treat any off-reservation taking of fish from stocks of the case area by such tribe or group as treaty fishing in making any allocation of fish to treaty Indians or in restricting the fishing of tribes recognized by this court as treaty tribes pursuant to the Decree and Orders in this case, without first obtaining the concurrence of the tribes involved.

2. In order to be entitled to exercise its off-reservation treaty fishing rights, any tribe allowed to

intervene in this case to assert its claim of treaty fishing rights shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty status and tribal organizations upon which the court may make a preliminary determination as to whether such tribe is to be dealt with as a treaty tribe entitled to fish at specified locations pursuant to the Interim Plan and Stay Order pending final determination of said tribe's status after a full hearing; *provided*, however, that nothing in this paragraph shall preclude members of such tribes from fishing off-reservation in conformity with state regulations applicable to anadromous fish, to the same extent as non-treaty right fishermen. Any court order permitting such interim fishing may impose such special conditions as it deems appropriate and shall set a schedule for presentation of evidence, briefing, and a full hearing on such issues and determination by the court. Any party disputing a tribe's claim of treaty entitlement or the recognition of specific usual and accustomed places shall cooperate in allowing the matter of final determination of such matters to be made promptly and as rapidly as the court calendar and the interests of justice permit.

G. **Non-Anadromous Fish and Shellfish.**

1. In order to be entitled to exercise off-reservation treaty fishing rights to non-anadromous fish and shellfish, any tribe party to this case shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty entitlements to such non-anadromous fish and shellfish upon which the court may make a preliminary determination as to the tribe's entitlement to such species, pending final determination of tribal treaty right entitlement to non-anadromous fish and shellfish; *provided,* however, that nothing in this paragraph shall preclude members of such tribes from fishing off-reservation in conformity with state regulations applicable to non-anadromous fish and shellfish, to the same extent as non-treaty right fishermen.

Following such preliminary determination, off-reservation fishing areas shall be opened only to the extent that tribes so established to have entitlement to non-anadromous fish and shellfish adopt and file with the court and defendants tribal regulations for the non-anadromous fishing activities of their members specifying the areas to be opened to fishing by tribal members. Any party disputing a tribe's claim of treaty entitlement or the recognition of specific usual and accustomed places shall cooperate in allowing the matter of final determination of such matters to be made promptly and as rapidly as the court calendar and the interests of justice permit.

2. The biologists of the defendants and biologists for the tribe shall meet to formulate general principles to be utilized as guidelines to be flexibly applied in the adoption of specific fishing regulations applicable to particular species of non-anadromous fish and shellfish. Such guideline principles shall be filed with the court no later than November 1, 1974.

3. The parties, or any of them, may invoke the continuing jurisdiction of this court in order to determine:

a. The procedure and/or method for adopting management principles with respect to any particular species of non-anadromous fish or shellfish;

b. The species taken at treaty times, where (usual and accustomed grounds), and by what tribes (who are entitled to exercise treaty entitlement);

c. Questions of allocation between plaintiff tribes and non-Indian fishermen of the harvestable portion of the specific species on non-anadromous fish or shellfish;

d. A timetable for the taking of evidence regarding any particular non-anadromous species or shellfish; and

e. Such other matters as the court may deem appropriate.

H. **Expiration of Interim Program**

This Order for Program to Implement Interim Plan

shall continue in full force and effect until further order of this court.

DATED this 8th day of October, 1974.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MEMORANDUM DECISION RE PRELIMINARY INJUNCTION — #1

January 20, 1975

Pursuant to oral comments at the hearing January 14, 1975, this Memorandum Decision has been prepared to further explain the Court's reasons for issuing the Preliminary Injunction entered that date. A brief explanation of this Court's views as to possible application of the Pierce County Superior Court Memorandum Decision in *Dept. of Game v. Puyallup Tribe, Inc.*, PCSC No. 158069 and dated 12/23/74, (hereinafter *Puyallup III*) to litigants in this case is contained in the filed copy of the transcript of proceedings before this Court on January 9, 1975 which is incorporated herein by this reference.

The controversy leading to issuance of the Preliminary Injunction involves the Department of Game's premature attempt to exclude all hatchery propagated steelhead from the harvestable shares available to all treaty-right fishermen. Although this Court has deferred trial of environmental issues in this case to a later time, and has abstained from ruling on the precise issue before the State Court in *Puyallup III*, the prior Decision, Judgment, Decree and other orders entered by this Court have never recognized a distinction between natural and artificially propagated anadromous fish resources in determining the scope of treaty fishing rights. The following language from pages 2 and 3 of the Declaratory

Judgment and Decree, entered February 12, 1974, is pertinent:

> "In addition and specifically for the purposes of interpreting all provisions of this decree, the following definitions shall be controlling:
>
> "1. *Anadromous fish:* Any fish which *spawns or is artificially produced* in freshwater, reaches mature size while rearing in saltwater and returns to freshwater to reproduce, and which spends any portion of its life cycle in waters within the Western District of Washington.
>
> "2. *Adequate production escapement:* In an approximate number of *anadromous fish*, that level of escapement from each fishery which will produce viable offspring in numbers to fully utilize *all natural spawning grounds and propagation facilities* reasonable and necessary for conservation of the resource, as defined in the Decision of the court.
>
> "3. *Harvestable stock:* The approximate number of *anadromous fish* which is surplus beyond adequate production escapement and Indian needs as defined in the Decision; that is, the number remaining when the adequate production escapement and Indian needs are subtracted from the run size." (Emphasis added)

Following issuance of the PCSC Memorandum Decision, which held that Indians of the Puyallup Tribe fishing at their usual and accustomed places in the Puyallup River System (including saltwater approaches thereto) did not possess a treaty right to harvest hatchery propagated steelhead, the Game Department notified the Court and counsel by letter dated 12/24/74 and received 12/26/74 that it intended to revise the numbers of steelhead harvestable by treaty Indians to exclude hatchery fish. This action was not in compliance with the following provisions of the Court's order of October 8, 1974, approving a Program for Implementing the Interim Plan:

> "1. At least sixty (60) days prior to entry of a run into the first fishery subject to state control run size predictions, *numbers of harvestable fish* set pursuant

to Paragraph 17 of the Injunction and information concerning run size, timing and condition requested by the tribes pursuant to Paragraph 18 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order shall be furnished by the state agencies.

"Until such time as predictions of steelhead run size are possible, Game shall determine the harvestable portion of the run in the best manner practicable, *after consulting with the plaintiffs to receive their suggestions.* Such predictions relating to harvestable numbers of fish shall be subject to review if the tribes believe there is better information from another source. If the parties cannot agree on the best source, the court shall make a determination through the Master in consultation with its Expert advisor. All predictions of harvestable numbers shall be further subject to review during the fishing season as additional information is obtained." (Emphasis added)

Counsel for the Game Department thereafter filed with the Court on 1/2/75 a notice dated 12/31/74 entitled "Closure of Green River Treaty Indian Commercial Steelhead Fishery" which purported to order a closure of Muckleshoot Tribal fisheries on the Green or Duwamish Rivers. This action did not comply with paragraph 19 of the Court's Injunction entered March 22, 1974, which states as follows:

"19. In order to accommodate unforeseen circumstances as readily as possible, consistent with conservation necessity, defendants may utilize procedures for making emergency regulations affecting taking of fish under their jurisdiction and control; *provided* that they shall adhere in every respect to the requirements of the Washington State Administrative Procedures Act and the regulations under it, and that the approval of such emergency regulations by this court where otherwise required by Final Decision #1 and this Injunction or the consent of all affected tribes has been obtained; *provided, however,* that *emergency regulations are enforceable by the state upon filing with the court and service upon the tribes affected (or their counsel of record, if any) a copy of such regulations and a statement of facts and circumstances of the emergency on which the regulation is based.* Any such tribe may respond and seek immediate court review. Requests for emergency consideration by this court will be given priority and determined speedily." (Emphasis added)

This Court has found and held and hereby reaffirms that the actions of the Game Department did not comply with the prior Decree and orders of this Court because Game: (1) failed to consult with plaintiffs prior to recomputation of the treaty-right harvestable portion of the steelhead runs for rivers other than the Puyallup; (2) failed to enact emergency regulations consistent with the requirements of the Washington State Administrative Procedures Act; and (3) failed to file with the Court and serve upon the affected tribes or their counsel copies of a properly enacted regulation and a statement concerning the alleged emergency upon which it was based. These actions and inactions of the Game Department, and the purported enforcement efforts taken by Game Department agents in removing Muckleshoot fishing nets from the Duwamish River represent conduct not legally justified, and presented a substantial danger of immediate and irreparable injury to the Muckleshoot plaintiffs, requiring issuance of the Preliminary Injunction dated January 14, 1975, which is incorporated herein by this reference.

It should be emphasized that these unauthorized activities by the Game Department, its Director, officers and agents, occurred despite the fact that procedures exist for proper and prompt presentation of such controversies to this Court. For example, paragraph 25 of the Injunction of March 22, 1974, at pages 15 and 16 establishes the following procedure pursuant to this Court's continuing jurisdiction:

"25. The parties or any of them may invoke the continuing jurisdiction of this court in order to determine:

"a. whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision #I or this injunction;

"* * *

"d. disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves;

"* * *

"In order to invoke such jurisdiction, the party shall file with the clerk of this court and serve upon all other parties (through their counsel of record, if any) a 'Request for Determination' setting forth the factual nature of the request and any legal authorities and argument which may assist the court, along with a statement that unsuccessful efforts have been made by the parties to resolve the matter, whether a hearing is required, and any factors which bear on the urgency of the request. Any party shall have an opportunity to respond to, join in, or supplement the request within seven days of its service or such other time as may be directed by the court. The court may then decide the matter, hold a hearing, or refer the request to the special master to hear evidence and legal argument, as soon as is practicable. * * *"

Counsel for the Game Department and counsel for amicus curiae Northwest Steelheaders have urged that this Court give full faith and credit and apply collateral estoppel to the State Court Decision in *Puyallup III*, and thereby hold that all plaintiff tribes in the case area possess no treaty rights to harvest hatchery propagated fish. Neither the law nor the factual setting presented justifies such a result. Initially, it must be recognized that the State Court Decision in *Puyallup III* is a "memorandum decision," that Findings of Fact, Conclusions of Law and a Decree have not yet been entered, and that therefore, the State Court's determination is neither a final decision nor judgment at this time. In that case, even a final judgment by the Pierce County Superior Court must be limited to consideration of the Puyallup Indian fisheries on the Puyallup River system vis-a-vis the state hatchery program for steelhead released into that river system. In addition, all plaintiffs in this case, other than the Puyallup Tribe, were not parties to or in privity with parties to, the State Court decision. Also, it is possible that the issue before the state court and the issue to be brought

before this Court concerning the possible relationship between environmental factors and artificial propagation may not be identical. For these reasons, this Court foresees serious questions as to whether the full faith and credit and collateral estoppel doctrines, even if properly applicable, would in any way affect the jurisdiction of this Court, except as to the Puyallup Tribe and the Game Department solely with respect to hatchery propagated steelhead in the Puyallup River system. See *Bernhard v. Bank of American Nat'l. Trust & Sav. Ass'n.*, 19 Cal.2d 807, 122 P.2d 892 (1942); *Henderson v. Bardahl Int'l. Corp.*, 72 Wn.2d 109, 431 P.2d 961 (1967).

However, this Court expresses no views as to the merits of the State Court decision at this time, having expressly abstained and reserved ruling on the matters before that Court, but recognizes that interpretation of federal treaty provisions is a federal question which can only be finally determined by the federal courts. Nevertheless, the Preliminary Injunction issued January 14, 1975 expressly excluded from its coverage any action taken by the Department of Game, its Director, officers and agents "necessary to comply with the judgment or orders of the State Courts with reference to fishing by or under the authority of the Puyallup Tribe and its members that may be issued in the case of *Department of Game v. Puyallup Tribe, Inc.* # 158069, Superior Court of the State of Washington in and for Pierce County * * * ."

For the reasons above set forth, this Court entered its Peliminary Injunction on January 14, 1975. By agreement of counsel, the motions of plaintiffs to include the State of Washington and Department of Fisheries within the coverage of that Injunction shall remain under advisement by the Court until such time as the motion may be noted for hearing.

IT IS SO ORDERED this 20th day of January, 1975.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

PRELIMINARY INJUNCTION 1975 CHUM FISHING

October 27, 1975

THIS MATTER having come on regularly for hearing pursuant to plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, and the Court having considered the pleadings, the evidence presented, and the argument of counsel, the Court makes the following Findings of Fact:

(1) The statistical data presented establish that the Indian treaty fishermen have taken significantly fewer coho than the non-treaty fishermen.

(2) The evidence clearly supports the fact that non-treaty fishermen engaged in a substantial fishery on the 1975 coho salmon run in direct violation of regulations issued by the State of Washington and orders of this Court.

(3) Due to unexpected circumstances including unauthorized fishing by non-treaty fishermen and problems of enforcement notwithstanding bona fide efforts by the Director of Fisheries, the Indian treaty fishermen have been significantly hampered in their ability and opportunity to harvest their share of fish to a substantial and significant extent.

The Court makes the following Conclusions of Law:

(1) Due to unforeseeable circumstances resulting in Indian treaty fishermen being denied their opportunity to harvest up to 50% of the salmon returning to their usual and accustomed grounds and stations. An equitable adjustment in the 1975 Chum fishery is necessary and appropriate.

(2) Indian treaty fishermen will suffer irreparable harm if further non-treaty fishing is permitted in Puget Sound Area outside the northern portion of Puget Sound Fishing Area No. 1.

3. No security is required inasmuch as this Injunction is granted on the motion of the United States Rule 65 F.R.C.P.

THEREFORE, IT IS HEREBY ORDERED that the State of Washington, its Director of Fisheries, their agents, officers, employees, and all persons acting pursuant to their authority are enjoined and restrained from promulgating or enforcing any regulation or otherwise authorizing any non-treaty commercial salmon fishing in any portions of the Strait of Juan de Fuca, Puget Sound, and any waters connected therewith, easterly of a line from Bonilla Point to Tatoosh except that portion of Puget Sound Salmon Fishing Area I lying northeasterly of a line projected from Partridge Point Light to Smith Island Light and northerly of a line from Smith Island Light to traffic separator buoy BW "R" to Trial Island Light until it first obtains the concurrence of the affected treaty tribes or the prior approval of this Court, or until treaty fishermen have taken 60,000 chum salmon, said amount to be determined in the first instance by the Fisheries Advisory Board. Thereafter, the defendants may authorize a joint treaty and non-treaty fishery.

Said defendants are further ordered to rescind any regulation already in effect which opens to non-Indian commercial salmon fishing during the remainder of 1975 any areas as described herein above.

The previously announced experimental purse seine fishery by permit only for surplus hatchery male chum salmon in Hood Canal up to a limit of 7,500 fish is exempt from the provisions of this Injunction.

DATED this 27th day of October, 1975.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ORDER ESTABLISHING FISHERIES ADVISORY BOARD

October 28, 1975

In order to promote the goals established in Final Decision #I — increased communication between the parties (384 F.Supp. 312 at 329-330), consultation before tribal or state regulations affecting treaty fishing are adopted (384 F.Supp. at 341, 420) — and to establish a more orderly procedure for making day-to-day management decisions, thereby reducing the need for adversary proceedings,

IT IS HEREBY ORDERED THAT

1.) There shall be and is established a Fisheries Advisory Board composed of the following:

a.) One member selected by the State of Washington. Unless the State provides otherwise, the State representative shall be the Director of Fisheries (or his alternate) in those situations where the matter under consideration primarily concerns species or areas under the jurisdiction of the Department of Fisheries, and the Director of Game (or his alternate) when the matter under consideration primarily concerns species or areas under the jurisdiction of the Department of Game.

b.) One member selected by the plaintiff Indian tribes or by an organization representing such tribes. Unless the tribes provide otherwise, the Indian representative shall be the Executive Director of the Northwest Indian Fish Commission (or his alternate).

c.) A non-voting member appointed by the Court who shall Chair the Board. The Court hereby appoints Dr. Richard Whitney, the Court's technical advisor in this matter, as the non-voting Chairman. If Dr. Whitney is unable to serve during any period that the undersigned Judge is unavailable to designate an alternate, the Master is hereby authorized to designate such an alternate.

2.) The Board shall consider any matter regarding the fishing resource that is submitted to it by the Court or by any of the parties. The Board shall advise the Court on technical aspects of the case and make recommendations on questions of management and regulation of the resource. The Board shall be vested with such other powers and authority as agreed by the members and delegated to it by the Court.

3.) The Chairman shall convene the Board on his own motion or at the request of any party or of the Court. The Chairman shall give to the public, the parties to this case and to members of the Board such notice as is praticable taking into account the urgency of the matter to be considered. Meetings shall be open to attendance by any person or group. Only board members as indicated in Paragraph 1 above shall be formal participants; however, the Board shall establish procedures for receiving input from other interested individuals and groups.

4.) The Board shall prepare a written report of its proceedings after each meeting which shall be filed with the Court and served on all parties and amici. Such reports shall include a summary of topics discussed, conclusions and recommendations agreed to by the members, and, in the case of questions which the Board has been unable to resolve, a statement of the various positions put forth and any recommendations or solutions proposed.

5.) Nothing contained herein shall affect the right of any party to judicial determination of any matter within the Court's continuing jurisdiction, as specified in previous orders of the Court, provided that the matter has first been submitted to the board for consideration and an aggrieved party seeks review of the Board's determination or the Board has been unable to reach agreement; provided further, that if the matter for determination is of such an emergency nature that delay would threaten serious harm to the resource, then submission to the Board shall not be required prior to submission to the Court.

6.) The Board shall establish such other and further

procedures for its deliberations as it deems advisable and shall include a description of such procedures in its reports to the Court and parties.

DATED this 28th day of October, 1975.

/s/ _____
GEORGE H. BOLDT
Senior United State District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ORDER RE SAMISH, SNOHOMISH, STEILACOOM, DUWAMISH AND SNOQUALMIE TRIBES' TREATY STATUS

March 19, 1976.

The Court has fully reviewed the hearing transcripts, exhibits, affidavits and memoranda of counsel and concludes therefrom that upon the showing thus far made, it would be difficult, if not impossible, to render a sound and well reasoned decision as to any of the five petitioning tribes. The decision as to each tribe will be limited solely to treaty status for the exercise of fishing rights but in the opinion of the Court this requires further submission of the factual data stated below.

No one has contested the applicability of the standards for treaty entitlement stated in the Ninth Circuit Court of Appeals, as follows:

> "Whether a group of citizens of Indian ancestry is *descended from a treaty signatory* and has *maintained an organized tribal structure*, is a factual questions which a district court is competent to determine." (Emphasis added) 520 F.2d at 693.

Apparently counsel for the tribes have submitted all information available to them pertaining to "organized tribal structure." However, if any party desires to present further evidence on that subject, such party may apply therefor, in writing, promptly after receipt of this Order.

Under the Circuit Court mandate, every group of persons of Indian blood must establish their descent from

a treaty signatory. While counsel for each of the five tribes has submitted current or dated tribal membership lists, only the Samish list contains information concerning blood quantum as to individual persons on the Samish tribal roll. A showing of individual tribal descendency from a treaty signatory is necessary. Although the Court is reluctant to require the submission of individual Indian blood quantum information, there have been serious disputes among the parties concerning the validity of certain persons being named as enrolled tribal members. Also, counsel have argued that waiver or abrogation of treaty rights by individual Indians is an issue in these proceedings and the Court believes that blood quantum information, among other factors, may have some relevancy.

Accordingly, counsel for each of the five tribes shall serve and file on or before Tuesday, June 1, 1976, the following information: A current list of the complete names and addresses of all persons listed as tribal members; the cities, states or other geographical locations where each person listed has established residence during his or her lifetime; and identification of the specific tribal blood quanta by fraction, of each person enrolled by each tribe. For example, a Steilacoom enrolled member may have one-quarter Steilacoom, one-eighth Puyallup and one-eighth Nisqually blood.

On or before Tuesday, June 1, 1976, counsel for each tribe shall submit the above specified data, in writing, serving and filing copies thereof upon the counsel of record in these proceedings. Counsel for any party may serve and file a memorandum, responsive to the above specified information reported by any tribe on or before Monday, June 14, 1976 and reply memoranda shall be served and filed on or before Monday, June 28, 1976.

IT IS SO ORDERED this 19th day of March, 1976.

/s/ _____
GEORGE H. BOLDT
Senior United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ORDER ON CERTAIN QUESTIONS RE: FISHERIES MANAGEMENT

April 14, 1976.

The Court's Fisheries Technical Advisor has propounded certain questions which he believes require resolution by the parties or the Court in connection with the further implementation of this Court's prior orders, and he has actively sought consultations with and recommendations concerning these questions from all of the parties. He has held consultations with such representatives as sought to participate and has considered all views submitted orally or in writing by any party hereto. Thereafter, the Court held hearings at which the Technical Advisor's report and recommendations together with all written memoranda and oral argument of the parties were considered. The Court having considered all of the foregoing and recognizing the need for an interim tentative determination of the issues presented to apply to the development of a management program for the coming year hereby Orders and Decrees as Follows:

In the preparation and implementation of a salmon fisheries management program for the case area for the year 1976 to continue the progressive implementation of the Orders and Decrees of this Court in this case, and particularly the Order of October 8, 1974, for a Program to Implement the Interim Plan, as extended by the Minute Order of April 5, 1976, the principles and guidelines set out below as answers to the questions shall apply. These answers are intended to implement the prior Orders of this Court and nothing herein is to be applied so as to change any provisions of Final Decision No. 1 or other prior Rulings or Orders of the Court as affirmed by the Court of Appeals. The Court hereby reaffirms its intention, as previously expressed, that these principles and guidelines are to be applied so as to progressively advance toward the

full and early realization of the opportunity for treaty fishermen to take their treaty-secured entitlement as set forth in Final Decision No. 1. The questions and responses are as follows:

1. Are fish of Canadian origin to be counted in the same set of books as those of United States origin? and
4. Are shares to be calculated on a stream-by-stream basis, or a regional basis, or for the case area?

Response: The shares which treaty and nontreaty fishermen are to be accorded the opportunity to harvest shall be calculated on a river-system by river-system basis wherever practical. This shall be based upon the system of origin and shall apply regardless of where the fishery occurs. Further clarification is presented in the responses below. In some cases, for more effective management or because data for stock separation do not exist, the sharing must be on a regional basis.

Shares will be calculated on a regional basis for South Puget Sound and Hood Canal, and on a river-system by river-system basis for the remainder of Puget Sound and the Washington coast (including the following combinations: Nooksack-Samish, Stillaguamish-Snohomish).

Canadian stocks passing through usual and accustomed fishing areas will be considered as a separate "river system" as will each other major salmon stock originating outside the case area.

All parties shall manage the salmon runs so as to insure that salmon in sufficient numbers return to each region or each river system or each combination as described above to allow treaty fishermen a fair opportunity to harvest their shares.

Nothing contained herein shall limit the Court's authority to make equitable adjustments to the full extent provided for in Final Decision No. 1 and the Injunction of March 22, 1974.

2. Are shares to be calculated separately for chum salmon stocks that differ in the timing of their runs?

Response: No — not for stocks within the same region or river system or combination described above — but they shall be managed separately.

3. What is an appropriate on-reservation share?

Response: This will be negotiated on a reservation-by-reservation basis between the state and each respective treaty tribe. Each tribe may initially inform the state what the tribe believes will be its fair and reasonable on-reservation catch and how the amount was calculated. If the state does not agree with the amount or the method of arriving at the estimate of the amount, the state may request supporting data from the tribe to be used in carrying forward the negotiations. The tribal estimate shall govern unless it is shown to be significantly inaccurate.

5. Are fish caught by foreign fishermen within United States contiguous waters to be counted in the non-Indian share?

Response: No. For the present, such fish shall not be counted in the non-Indian or treaty Indian share.

6. Do fish caught outside of three miles (i.e., outside State territorial waters) count in the shares?

Response: Such fish originating in the case area which are harvested by

(a) Washington fishermen outside of the territorial limits of the State of Washington, and

(b) other United States fishermen and landed in the State of Washington shall be included in the total number from which shares will be determined.

The Court reserves its exercise of equitable discretion to determine the number of fish harvested by the above classes of fishermen that will be included in the allocation until presented with evidence upon which to base the extent of such discretion. See also answers to questions 7 and 8.

7. Are juvenile fish caught in the sport fishery to be considered equally with mature fish taken by commercial and Indian fisheries?

8. Are fish in the offshore troll fishery to be considered equally with mature fish taken on their way to the streams?

Response: For purposes of determining the appropriate off-reservation allocation, all runs will initially be computed as those harvestable numbers of salmon that would return to treaty fishing areas in the absence of nontreaty fishing as clarified under No. 6. The reservation, ceremonial and subsistence catch adjustment (see question 3) will then be subtracted before equal catch shares are computed. Each projected run size will be a net result of accounting for natural mortalities, additional Canadian interceptions, and direct fishery-related wastage, such as hooking mortality and net "drop-out" which are not reflected in actual landings. The first two factors would take place in the absence of nontreaty fishing and reduce projected run sizes, while the third factor has an opposite effect.

These factors shall be used in recomputing the actual harvest in a sport fishery, a fishery on juveniles, or a troll fishery, whether the harvest is made by a treaty fisherman or a nontreaty fisherman.

9. How do we determine whether one party or the other is unable to harvest its 50%?

Response: There is little doubt that nontreaty fisheries can harvest greater than their 50% of any case area salmon stock, and the issue has been over the fishing power of treaty fisheries.

Treaty tribes should submit to the State, along with their proposed regulations, documentation of their expected fishing power for upcoming fisheries. the documentation should include descriptions of fishing gear, estimates of the number of units of each type of gear, the times and places the gear will be fished, and a statement of the tribe's anticipated harvest level or intent to take their full share.

If the State disagrees with the tribe's estimate of fishing power, the State must show that the tribal effort will not be sufficient with a critical evaluation based on

some factual information. The evaluation must be based on projected estimates of increased effort and/or estimates of effectiveness of any new techniques planned by the tribe.

If in the future it is a nontreaty fishery that has questionable fishing power, the responsibilities outlined above will be reversed.

10. (a) If the State negotiates with Indians to take surplus fish at the hatcheries, will the fish be counted as part of the 50%?

Response: All agreements should be negotiated on a tribe-by-tribe basis. Hatchery surplus fish used for ceremonial, subsistence or charitable purposes shall not count in the Indian share. The number of fish taken at the hatcheries for commercial use shall be subject to a reduction on an equitable basis to reflect the reduced value of those fish. The nature and extent of such reduction shall be negotiated by each tribe.

(b) Will fish sold on bid to non-Indians or donated to institutions for the needy count in the non-Indian share?

Response: No. The surplus fish are taken by the State government and used for charitable purposes and the funds derived from the disposal of the fish are used for State governmental purposes. Thus the fish shall not count in the non-Indian share.

11. What is the definition of a test fishery?

Response: A test fishery is a fishery allowed on a limited basis for the purpose of acquiring technical or management information including run strength, timing, composition, gear selectivity, exploitation rate, and enhancement possibilities. Any fish taken in test fisheries are not to be sold for personal profit.

Procedural guidelines governing test fisheries shall be estimated in the Jurisdictional Guidelines which will be a part of the Joint Management Plan to be finalized April 16, 1976.

12. Is there a time schedule within which the Court is willing to allow the Department of Fisheries to operate in moving toward providing the full 50% harvest opportunity for Indians?

Response: The Washington Department of Fisheries indicates that it can fully provide treaty Indian fishing opportunities in 1976 and subsequent years for all usual and accustomed areas of tribes in the case area for coho, chum, sockeye, and pink salmon stocks. Full fishing opportunities can be provided for Coastal, Northern Puget Sound, and Canadian chinook salmon stocks but precise catch sharing for inner Puget Sound chinook runs may not be attained immediately. This latter situation is complicated by offset harvest by treaty and nontreaty fishermen, expended artificial production that has not been stabilized, and an emergent treaty fishery on blackmouth. Restrictions of the nontreaty recreational fishery beginning in 1976 will, however, hasten the process of equitable catch division.

The parties having not yet fully considered the application of the foregoing principles and guidelines to the steelhead fisheries, they shall presently be applicable only to the 1976 salmon fisheries management.

This order shall be effective until March 1, 1977, or until otherwise ordered by the Court.

IT IS SO ORDERED this 13th day of April, 1976.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

TEMPORARY RESTRAINING ORDER

July 31, 1976

This matter having come on for hearing before me this day upon motion of the plaintiff-intervenor Makah, Lummi and Quileute Tribes, supported by other intervenor tribes having rights in waters subject to the

provisions of the Convention between the United States and Canada of 1930 establishing the International Pacific Salmon Fisheries Commission, supported by affidavits and exhibits, the Court having adduced testimony and being satisfied that unless restrained, the actions of the respondents State of Washington and the United States will cause said plaintiff-intervenors irreparable harm, now therefor

IT IS HEREBY ORDERED that the United States of America, its officers, employees and agents and the State of Washington, Department of Fisheries and its officers, employees and agents are and they are hereby restrained from implementing or enforcing the 1976 regulations of the International Pacific Salmon Fisheries Commission so as to deny any of said tribes the right to fish during any times when fishing is permitted by said regulations in Convention waters, including the troll fishery west of the Bonilla Point-Tatoosh line, provided however that said petitioner-intervenor tribes shall be restricted to fishing no more than five days per week, at least two of which shall be days permitted by the International Salmon Fisheries Commission in areas east of the Bonilla Point-Tatoosh line. The specific days that Indian fisheries shall be as established by regulation of the tribes authorized to fish hereunder, which tribes shall however consult with Dr. Richard Whitney, the Washington State Department of Fisheries and the National Marine Fisheries Service in order to insure that such fishing is consistent with conservation requirements; and provided that tribal fishing shall commence no sooner than 7:00 p.m. Monday, August 2, 1976. This Temporary Restraining Order shall remain in effect until further order of this Court and upon determination of plaintiffs' motion for preliminary injunction which shall be heard at 9:30 a.m., August 10, 1976.

DATED this 31st day of July, 1976.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MINUTE ORDER MODIFYING TEMPORARY RESTRAINING ORDER

August 5, 1976

This matter having come on for hearing on the motion of the United States for interpretation and dissolution of the Temporary Restraining Order herein, dated July 31, 1976, the Court having heard the matter by telephone conference call this date, and the parties appearing as follows:

United States by Assistant United States Attorney James Waldo

State of Washington by Assistant Attorney General James Johnson

NOAA appearing by Attorney Edward Evans

The Makah and Lummi Tribes by Attorney Alvin J. Ziontz

The Lower Elwha, Port Gamble, Suquamish and Nooksack Tribes by Attorney Alan Stay,

Dr. Richard R. Whitney having participated in the conference call as Court Advisor, and the Court after hearing arguments, the Court enters the following Order:

I. The Temporary Restraining Order of July 31, 1976 herein is modified to provide that Tribal Fishermen exercising treaty rights in convention waters of the IPSFC shall be entitled to fish for a period of three days per week, subject to the following conditions:

(A) Such three days shall be a continuous period;

(B) Such three days fishery shall be completely available at such times and places and in such manner as is practical and feasible for said Treaty Fishermen;

(C) Such fishery shall NOT be subject to action which conflicts with these conditions or constitutes harassment of said treaty fishing;

(D) In the event IPSFC changes its present regulations concerning permitted fishing days in waters East of the Bonilla Point-Tatoosh line, Indian Fishermen shall be entitled to fish one day over and above days permitted to Non-Indian Fishermen;

(E) It is the intention of the foregoing conditions to provide Indian Fishermen with the right to continue their fishery uninterrupted from the opening time set by the Commission for net Fisheries to the closing time prescribed for net fisheries provided that this is not construed so as to conflict with any of the foregoing provisions.

II. As modified this Temporary Restraining Order shall remain in effect until the hearing on the Preliminary Injunction or until further Order of this Court. Said hearing shall be on August 18, 1976 at 9:30 A.M.

The plaintiff tribes shall have until August 12, 1976 in which to serve and file any memoranda, briefs or other submissions in support of their motion. Responding parties shall respond on or before August 17, 1976.

III. Treaty fishing shall continue from 3:00 P.M., August 5, 1976 through 9:30 A.M. August 6, 1976.

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The foregoing Minute Order Modifying the Temporary Restraining Order entered on this 5th day of August, 1976 by Rosemary Freeny, Deputy Clerk in Charge, Tacoma Office of the Clerk by direction of the Court, The Honorable George H. Boldt, Senior United States District Judge.

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U.S. v. WASHINGTON

District Court: No. 9213

MINUTE ORDER

August 19, 1976

Now on this 19th day of August, 1976, the Court directs the Clerk to enter the following Minute Order:

In a telephone conference with counsel of approximately forty-five minutes in length, the question of whether paragraph I(D) of the Minute Order entered August 5, 1976 should be interpreted as requiring a one day fishery for treaty fishermen during the present total closure of American sockeye fishing. Upon conclusion of the presentation of all counsel, the Court orally announced to counsel the rulings of the Court which are confirmed by this Minute Order:

1. National interests, in the opinion of the Court, require that in the present situation Indian fishery should not be approved by the Court when all American fishing is prohibited.

2. As promptly as possible, counsel shall attempt to agree upon a method of providing the treaty fishermen with an equitable adjustment for their lost opportunities to catch fish; and

3. If sockeye fishery by Americans be opened at any time hereafter, treaty fishermen shall have the opportunity to take fish in accordance with paragraph I(D) of the Minute Order entered August 5, 1976.

IT IS SO ORDERED THIS 19TH DAY OF AUGUST, 1976, 12:30 P.M. PACIFIC DAYLIGHT IME.

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The foregoing Minute Order entered by Rosemary Freeny, Deputy Clerk in Charge, Tacoma Office of the Clerk by Direction of the Court, The Honorable George H. Boldt, Senior United States District Judge.

U.S. v. WASHINGTON

District Court: No. 9213

AGREED ORDER

August 25, 1976

This matter having come on for hearing on the Court's motion sua sponte to consider the question of

mootness of the Motion for Preliminary Injunction re 1976 Fraser River sockeye, and the court having heard evidence and considered the argument of counsel does hereby determine and ORDER that:

1. The Motion for Preliminary Injunction is moot as it pertains to the 1976 sockeye season and these proceedings are therefore terminated as to that matter.

2. The evidence further establishes that the Indian Tribes having rights in the International Sockeye Fishery are entitled to an equitable adjustment as a result of the failure of the 1976 I.P.S.F.C. regulations to provide them with a proper opportunity to take their share of sockeye in 1976.

3. The parties are directed to meet as promptly as possible so that the tribes referred to in paragraph 2 above can present the Washington Department of Fisheries their proposal for equitable adjustment.

4. The Washington Department of Fisheries and the U.S. Fish and Wildlife Service shall cooperate fully in providing all reasonably available data requested by the tribal representatives in connection with the proposed equitable adjustment program.

This matter will come on for hearing September 3, 1976 at 9:30 a.m.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ORDER RE: 1976 COHO FISHERY

September 6, 1976

This matter came on for hearing before the court on September 3, 1976 pursuant to plaintiffs' motion for a Preliminary Injunction against opening the non-treaty coho fishery in Puget Sound until the treaty fishermen

have harvested a specific number of coho. The court having held a hearing thereon, considered the affidavits, testimony and other evidence offered, the recommendations and views expressed in open court by the court's Fisheries Technical Advisor, Dr. Whitney, and the written and oral arguments of counsel, now FINDS, HOLDS AND ORDERS as follows:

The Court FINDS AND HOLDS:

1. After allowing for a spawning escapement number that is not in dispute, the estimated numbers of harvestable Puget Sound origin coho salmon returning to Puget Sound Fishing areas in 1976 is 702,750 fish. Both plaintiffs and defendants agree on this figure. The numbers returning to specific areas of the Puget Sound basin as calculated by the defendants are as follows:

Strait tributaries	29,130
Nooksack-Samish	95,815
Skagit	14,380
Snohomish-Stillaguamish	81,580
Southern Puget Sound	403,815
Hood Canal	79,030
	702,750

Plaintiffs do not dispute these numbers.

2. The returning run size estimate set out in Finding No. 1 above, while the best available at this time, is only a pre-season prediction based upon pre-return indicators. It is subject to later adjustment as the runs actually pass through Puget Sound waters. On several past occasions such pre-season predictions have been found to be high and it has been necessary to invoke mid-season restrictions on those fisheries which occur in Puget Sound or tributary rivers.

3. Prior interceptions of 1976 Puget Sound origin coho salmon by non-treaty fishermen authorized by the laws and regulations of the defendant State of Washington, together with anticipated future sport harvest from such runs under existing State laws and regulations, have been calculated by the Department of Fisheries to total 405,200 fish. The majority of this figure represents fish that have already been

taken. The plaintiffs do not dispute this figure in this proceeding.

4. The treaty Indian fishing areas are primarily in those areas which the fish do not reach until after they have passed through areas of substantial non-treaty fisheries that operate under State of Washington authorization and control. Thus the principal treaty Indian fishery comes second, chronologically, to a substantial non-treaty fishery which has already operated under State control.

5. The heavy non-treaty fisheries which have occurred prior to the return of the coho run to inner Puget Sound harvest the majority of the total non-treaty share, resulting in the majority of the allowable inner sound fisheries being treaty Indian fisheries to allow treaty Indians an opportunity to harvest their share. In these circumstances the treaty fisheries assume a disproportionate share of the risk of over-estimates of run size and resultant early restriction of their fisheries.

6. Though there is a dispute as to some of the on-reservation adjustments which has not been resolved in accordance with the orders of this court the treaty tribes are entitled to the majority of the 1976 coho run returning to Puget Sound because of the above interceptions by non-treaty fishermen.

7. Defendant Fisheries have proposed to open a non-treaty commercial net fishery on Puget Sound origin coho on September 12, 1976. Treaty fisheries are presently scheduled to commence September 5, 1976.

8. According to defendants' and plaintiffs' computations most of the non-treaty share has already been taken or will be in fisheries already authorized (26% vs 19% still remaining). Only an insignificant amount of the treaty share has been taken to date.

9. The non-treaty fleet is many times larger than the total Indian fleet and in any particular area it would be extremely difficult for treaty fishermen to take their entitlement of coho in competition with the non-treaty fleet. The rate of catch for treaty fishermen is substantially higher therefore when they are able to fish during a period when they are not subjected to such competition. Therefore, treaty

fisheries must be afforded some additional time in which they can harvest coho without fishing in competition with non-treaty fishermen.

The regulations proposed by the Department of Fisheries would not insure adequate limitation on the non-treaty fisheries to allow to treaty fishermen an opportunity to harvest their entitlement.

10. Any illegal non-Indian fishery which occurs in violation of the orders of this court and in violation of the orders of defendant Fisheries pursuant to the decision and orders of this court will further impair the treaty right as defined by this court.

11. Although the loss to treaty fishermen caused by continued illegal non-treaty fishery is difficult to quantify.

Given the magnitude of the non-treaty fleet, and the adverse effects caused by its illegal fishing both in actual harvest and direct interference with the ability of treaty fishermen to harvest, it is reasonable to provide that a reduction of the total non-treaty entitlement shall be by an additional 20,000 fish, over and above the actual non-treaty harvest for each day of substantial and reasonably verifiable non-treaty illegal fishing.

12. The only way to allow the Makah Tribe some additional opportunity to participate in the harvest of the 1976 coho runs is to allow that tribe to fish for coho in Puget Sound in waters outside their usual and accustomed grounds and stations as defined by this court. Tribes with usual and accustomed grounds and stations in Puget Sound have expressed a willingness to allow the Makah Tribe to fish with them in those waters.

Upon the above stated Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. To Provide to all tribes a fair opportunity to harvest their treaty entitlement of coho salmon in 1976, except as provided in paragraph 2 below, the Defendant State of Washington and all instrumentalities thereof, including but not limited to its courts, Defendant Donald W. Moos, Washington Director of Fisheries, and the

officers, agents, employees of any of them are enjoined from authorizing, permitting or ordering any non-treaty commercial fishing in any waters of the State of Washington inside of the Tatoosh Island-Bonilla Point Line (Washington Department of Fisheries Salmon Fishing Areas 4B through 13B, inclusive) prior to 6:00 a.m. Monday, September 20, 1976.

2. Nothing in this Order shall prohibit the Defendants from authorizing a non-treaty fishery in salmon fisheries areas 7 or 7A.

3. It is further ordered that to compensate for losses sustained by treaty fishermen due to the continued illegal fishing by non-treaty fishermen which may occur in the 1976 coho season, the total non-treaty entitlement shall be reduced by an additional 20,000 fish over and above the actual non-treaty harvest for each day of substantial and reasonably verifiable non-treaty fishing in violation of Washington Department of Fisheries closures.

The Fisheries Advisory Board shall closely monitor the 1976 fishery and report thereon to the Court each day as to illegal reasonably verified non-treaty fishing.

4. The proposal for the Makah Tribe to fish in Puget Sound pursuant to the invitation or approval of the tribes having usual and accustomed grounds and stations there is hereby approved.

5. Defendants are ordered, in compliance with earlier orders of this court to negotiate with the tribes when agreement on the number of fish taken on reservation has not been reached. Any disagreements shall be resolved by the Fisheries Advisory Board,

6. The Fisheries Advisory Board is directed to consider, make findings and determine any additional matters associated with the 1976 Puget Sound coho fishery.

IT IS HEREBY SO ORDERED this 6th day of September, 1976.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MASTER'S REPORT RE: LUMMI SPRING CHINOOK FISHERY (1977)

May 17, 1977

Pursuant to the Minute Order Re: Temporary Restraining Order Re: Lummi Spring Chinook Fishery entered on 2 May 1977, Magistrate Cooper, acting as Master, held a hearing on 9 May 1977, for the purpose of determining all fact issues pertaining to the motion to enjoin that fishery. The Master considered affidavits submitted, testimony, exhibits and argument at that full hearing. A transcript of the proceedings by an official court reporter will be on file with the clerk of the United States District Court.

Based upon an examination of the pleadings, affidavits, evidence, exhibits, and testimony of the witnesses and the arguments of counsel and based upon a preponderance of the evidence creditable and inferences reasonably drawn therefrom, the Master makes the following Findings of Fact and recommended Conclusions of Law.

FINDINGS OF FACT

I.

The evidence shows a significant danger to the 1977 spring chinook run in the Nooksack River if any further fishery is allowed including that treaty Indian fishery occurring on the Lummi Reservation.

II.

Notwithstanding the experience of the witness for the Lummi Tribe, the balance of expert opinion including the testimony of Fisheries expert Phinney and the recommendation of the court's expert advisor, Doctor Whitney, indicated need for a total closure of the spring chinook fishery to continue on the Nooksack River.

III.

Nooksack River spring chinook runs of the brood cycle 1977 have shown a continued decline similar to that of other Washington and British Columbia chinook runs. The catch from that brood year in the river has shown the following decline:

Year	Catch
1957	2,281
1961	1,868
1965	1,250
1969	1,150
1973	771

IV.

Information indicating the need for such a conservation closure has been communicated to the Lummi Tribe on at least the following occasions:

(A) March 16, 1977, in accordance with the court's orders, the report "1977 Status of Spring Chinook of Puget Sound and Recommendations for Management" were distributed to the Lummi Tribe recommending protection for the Nooksack spring chinook run.

(B) April 8, 1977, a notice was sent to the Lummi Tribe notifying of the need for complete protection of spring chinook in the Nooksack River.

V.

Meetings of the Fishery Advisory Board conducted to discuss the need for conservation closure of the Nooksack River spring chinook fishery were held three times, on April 18, April 20, and April 25. Subsequent to those meetings, a report of the meetings was submitted by Doctor Whitney (Master's Exhibit 1 in these proceedings) in which Doctor Whitney concluded by recommending closure.

VI.

The expert testimony indicates that in order to protect the 1977 spring chinook run, such a closure should last until 30 June 1977.

VII.

Unless ordered by the court, the Lummi Tribe will not close its fishery.

Fron the foregoing Findings of Fact, the Master recommends the following:

CONCLUSIONS OF LAW

I.

The court has jurisdiction to enact and enforce an emergency closure upon reservation treaty fishing where clearly necessary to protect a run and where the tribe refuses to do so.

II.

The Department of Fisheries has complied with the orders of the court and procedures set up in asking the court to order this emergency closure.

III.

A clear conservation need for a closure on the Nooksack River to the taking of spring chinook until 30 June 1977 has been demonstrated.

IV.

Irreparable injury, loss and damage may result to the spring chinook run in the Nooksack River if the Lummi Tribe is allowed to continue to harvest fish from that run because all spring chinook salmon present are necessary for spawning escapement to perpetuate that run.

THEREFORE I recommend that an order enjoining fishing by the Lummi Tribe and its members in the Nooksack River for spring chinook be continued in effect until further order of the court or until 30 June 1977.

DATED this 17th day of May, 1977.

/s/ _____

ROBERT E. COOPER

U.S. v. WASHINGTON

District Court: No. 9213

PRELIMINARY INJUNCTION RE: LUMMI SPRING CHINOOK FISHERY (1977) AND LUMMI STEELHEAD FISHERY (1977)

May 18, 1977

The court having reviewed the reports of Special Master Robert E. Cooper concerning Lummi Spring Chinook Fishery (1977) and Closure of Lummi Steelhead Fishery (1977) and having been informed that no counsel for any interested party seeks a review by this court of said reports, the court hereby approves and adopts said reports of the Special Master, including the Master's Findings of Fact and Conclusions of Law.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That the Lummi Tribe and its members, agents and any persons acting in concert with them are hereby enjoined from fishing for chinook salmon in the Nooksack River and are hereby enjoined from fishing in adjoining marine waters for chinook salmon whether within or without the exterior boundaries of the reservation until further order of the court or until June 30, 1977.

(2) That the Lummi Tribe and its members, agents and any persons acting in concert with them are hereby enjoined from fishing for steelhead trout in the Nooksack River and are hereby enjoined from fishing in adjoining marine waters for steelhead trout whether within or without the exterior boundaries of the reservation until further order of the court.

IT IS SO ORDERED this 18th day of May, 1977.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MOTION FOR TEMPORARY RESTRAINING ORDER AND PERMANENT INJUNCTION

July 18, 1977

Comes now the Muckleshoot Indian Tribe pursuant to paragraphs 19 and 25 of this Court's Injunction of March 22, 1974, and requests that the Court enter the following Temporary and Permanent Injunctive Relief:

1. Order the State to lift its emergency regulation closing Lake Washington to treaty fishing (number 77-42) dated June 1, 1977, a copy of which is attached hereto, and

2. Issue a Temporary Restraining Order enjoining the State from enforcing any State statutes which affects treaty fishing without first complying with the procedures established by the court, e.g. a formal determination by the court or agreement by the parties that said statute or regulation is reasonable and necessary for conservation and especially enjoin the utilization of RCW 75.12.010, or any regulation promulgated thereunder to affect treaty fishing, and

3. Issue a Permanent Injunction enjoining the State from utilizing any statute or regulation that has not been determined by the court pursuant to the procedures prescribed by *United States v. Washington*, to be reasonable and necessary for conservation, and

4. Issue a Permanent Injunction ordering the State subsequent to the imposition of an emergency conservation closure enacted pursuant to paragraph 19 of this court's March 22, 1974, Injunction as modified by the Procedures for the Court Advisory Board dated December 12, 1976 to rescind said emergency closure at the earliest possible time when the purpose and cause for such closure has ended but in no event shall such emergency closure remain in effect for longer than thirty days without a new justification, and

5. Enter an order that the failure of any State agent, employee, or attorney to comply with this order shall subject same to contempt of court, and

6. Award reasonable attorney fee to Plaintiff counsel, and

7. For such other and further relief as the Court deems just and equitable.

This motion is based upon the records and files contained herein, and the memorandum and affidavits attached hereto.

DATED this 18th day of July 1977.

/s/ _____
ALAN C. STAY, Attorney for
the Muckleshoot Indian Tribe

U.S. v. WASHINGTON

District Court: No. 9213

TEMPORARY RESTRAINING ORDER

July 21, 1977

THIS MATTER having come on regularly for hearing pursuant to plaintiffs motion for a temporary restraining order and preliminary injunction, and the Court having considered the pleadings, affidavits, and arguments of counsel.

AND IT APPEARING TO THIS COURT, that:

1. On or about June 1, 1977, the Washington Director of Fisheries adopted and filed with this Court an emergency regulation, Director's Order No. 77-42, closing Indian Treaty Puget Sound Salmon Management and Catch Reporting Areas 10B, 10C and 10D to commercial salmon fishing by treaty indians for the reason that the February forecasts of 1977 sockeye run size indicated the need for "complete protection" because the run would be below spawning escapement needs. At that time the Director represented to the

tribes and this Court that if later data, to be compiled after the run started passing the Ballard Locks counting station, indicated a run in excess of escapement needs a sport and net fishery could be authorized.

2. On July 14, 1977, the Director of Fisheries adopted an emergency regulation opening Lake Washington (Areas 10C and 10D, referred to above) to sport fishing commencing July 16th after he formally found and declared that the run size was 44,000 (now fixed at 61,000) fish more than are needed for escapement and that an emergency opening was necessary to harvest those excess fish. The Director has, however, refused tribal requests to rescind his conservation closure of the treaty Indian fishery on these same fish.

3. By the Director's own published formal finding no conservation reason exists that necessitates a continued closure of the treaty Indian fishery.

4. The application of RCW 75.12.010 and Director of Fisheries' Order No. 77-42 or other regulations of similar effect to restrict the treaty Indian fishery on the 1977 Lake Washington sockeye salmon run would be contrary to the rights of the affected treaty Indians as previously determined by this Court.

5. The affected treaty Indians would suffer irreparable injury unless the defendants are immediately restrained as herein provided.

6. The refusal of the State to remove its prohibitions on the treaty Indian fishery after ascertaining that they were not necessary for conservation as defined by this Court indicates the need to require prior approval of this Court before imposing or applying any future restrictions on the treaty Indian fishery in the waters described above.

NOW THEREFORE, IT IS HEREBY ORDERED, that the State of Washington, its Director of Fisheries, their agents, officers, employees and attorneys and all persons acting or purporting to act pursuant to their authority or in concert therewith are temporarily enjoined and restrained from (1) applying RCW

77.12.010 or subsections (608), (609) or (610) of WAC 220-28-100 as added by Director of Fisheries Order No. 77-42, dated June 1, 1977, to prohibit, restrict or any wise interfere with fishing for, taking, possessing or disposing of salmon from Washington Department of Fisheries Treaty Indian Puget Sound Management and Catch Reporting Areas 10B, 10C and 10D as described in WAC 220-22-330, dated June 10, 1976, by members of any of the plaintiff tribes in this case who have been determined by this Court to have usual and accustomed fishing places in such Reporting Areas; (2) imposing or applying any restriction on such fishing, taking, possession or dispostion during the remainder of the 1977 sockeye run without first obtaining the express approval of this Court.

IT IS HEREBY FURTHER ORDERED, that a hearing shall be held on the 1st day of August 1977, at 9:30 a.m., to determine whether a preliminary or permanent injunction shall be issued.

DATED this 21st day of July, 1977.

/s/ _____
GEORGE H. BOLDT
Senior United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

FINDINGS OF FACT

June 6, 1978

1. The treaty fishing rights of the plaintiff tribes have been previously determined by this Court.

2. Since 1974 there has been increasing difficulty in enforcing treaty fishing rights. Denial of treaty fishing opportunity will result in injury to economic, cultural and governmental interests of the plaintiff tribes.

3. If the lack of enforcement of treaty Indian fishing rights by the State of Washington continues, there will be irreparable harm to the plaintiffs' rights assured them under the decision of this court.

4. The evidence has established that there have been numerous instances of violations of State regulations designed to allocate additional fish to treaty Indians, but there has been a lack of enforcement against these violators, either due to State court decisions or the enforcement policies set by the Washington State Department of Fisheries.

5. The State of Washington has indicated through its court decisions, and through its executive policy, that the Director of the Department of Fisheries is not empowered to promulgate regulations allocating additional fishing opportunity to treaty Indians as required by the decision of this court.

6. The Washington Department of Fisheries did not assist in issuing citations or serving the enforcement injunction during 1977.

7. An emergency exists because of the State of Washington's continuing inability and unwillingness to assume its regulatory and enforcement responsibilities under *Final Decision 1*. This mandates the creation of a federally-led enforcement group, which needs time to develop a comprehensive enforcement plan for the upcoming season.

8. Alternatives to direct injunction of non-treaty fishermen which have been used by this Court in previous years to obtain compliance with its orders have not sufficiently deterred violations of those orders, nor provided adequate additional fishing opportunities to treaty tribes.

9. Although the Court may speculate that if no injunction were issued, there might be less havoc in the fishery, that is not the test. The test is whether or not treaty fishing rights can be effectuated without the entry of the injunction. No alternative plan which contemplates enforcement of treaty fishing rights has been presented.

10. The Court has the authority to enjoin the fishermen who are non-parties in this case. Rule 65(d) of the Federal Rules of Civil Procedure does not enumerate the only non-parties who may be enjoined. *See also, Puget Sound Gillnetters Association v. United States District Court for the Western District of Washington*, ____ F.2d ____, No. 773129 (9th Cir. Apr. 24, 1978).

11. Notice of this hearing has been given to approximately 2,455 of the 2,700 commercial net fishermen directly affected by the proposed injunction. Additionally, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association and the Grays Harbor Gillnetters Association have been given notice. Several of these non-parties have appeared and have been given the opportunity to address the Court and to present evidence. The fact that they are not parties to this lawsuit has placed restrictions on the scope of their participation.

12. None of the non-party associations or persons asked for intervention in connection with this proceeding. Under the reference to the Magistrate, there was no power for him to grant the status of "party" to a non-party.

13. Although both the United States and the plaintiff tribes offered to make witnesses available to the non-party participants, none took advantage of this offer.

14. Although the implementation of the treaty rights as determined in *Final Decision 1* necessarily diminishes the opportunity of the non-treaty fishermen to harvest fish, that fact is not controlling.

15. Until a better solution arrives through agreement by the parties, congressional action, or the willingness of the State of Washington and its courts to assume the State's management and enforcement responsibilities as directed by *Final Decision 1*, this Court, in its continuing jurisdiction over the resource, must provide for protection of treaty fishing rights.

16. It is appropriate to limit those circumstances under which enforcement officers may board fishing vessels for purposes of investigating violations of the injunction to those situations where they have probable cause to believe that a violation has occurred.

17. The nature of the fishery is such that an effective management and enforcement system must provide the ability to open and close the fishery on short notice.

18. The enforcement injunction presented by the Government provides a reasonable means by which to notify the fishermen of lawful openings and closings.

19. A toll-free telephone "hotline" has been used to announce fishing regulations in the State of Washington for several years.

20. Statements of several of the fishermen who appeared before this Court indicate that widespread resistance to recognizing treaty fishing rights still exists.

21. Voluntary reductions in non-Indian fishing are unlikely. An individual fisherman wishing to make a good faith effort to comply with *Final Decision 1* cannot do so unless some government tells him when he may fish without infringing on treaty rights. The State of Washington will not do this.

22. Because the non-treaty marine fishing fleet is much larger and more efficient than the treaty fleet, and because much Indian fishing occurs in the terminal areas, substantial curtailment of the marine fishing opportunity for non-treaty fishermen is necessary in order to permit treaty fishermen the opportunity to catch the share of the runs to which they are entitled.

23. During the 1976 and 1977 fishing seasons the Washington State Department of Fisheries developed a

policy of not issuing citations to violators of allocation closures.

24. The Washington State Department of Fisheries has the power to regulate the fishermen it controls in such a way as to shift the burden of providing treaty Indian fishing rights away from the net fishermen and spreading it to the hook-and-line fishermen by controlling their seasons, bag limits, gear type, and otherwise restricting hook-and-line fishing.

25. During the 1977 fishing season, there was a substantial amount of fishing during conservation closures. While most of this fishing was done by non-treaty fishermen, the State of Washington cited over 100 treaty Indians for fishing in violation of conservation closures as defined by the Washington Department of Fisheries.

26. During 1976, over 135,000 fish were taken in violation of State regulations, and during 1977, over 183,000 were taken by fishermen licensed by the State of Washington.

DATED this 6th day of June, 1978.

/s/ _____
GEORGE H. BOLDT
United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

CONCLUSIONS OF LAW

June 6, 1978

1. In order to provide treaty Indians with the opportunity to catch 50% of the salmon returning to their usual and accustomed grounds, it is necessary to provide them with substantial exclusive fishing time.

2. Because of State Court interpretation of its regulatory authority, the Washington State Department of Fisheries will not promulgate regulations g ing treaty Indians exclusive fishing time.

3. The failure to provide treaty Indians with substantial exclusive fishing time will cause them irreparable harm to their right to the opportunity to catch 50% of the salmon returning to their usual and accustomed grounds.

4. The rights of the treaty and non-treaty fishermen have already been adjudicated, therefore economic disruption associated with implementing the 1974 decree is not legally cognizable. Weighing the relative legally cognizable hardships, the Court finds that the plaintiffs would be more damaged if this injunction were not entered than the defendants and non-party fishermen will be by its entry.

5. It is probable that the plaintiffs would succeed at a trial on the merits.

6. The public interest will be served by entry of this injunction in that United States treaty obligations will be upheld, United States District Court orders will be enforced, and a breakdown of law and order will be prevented.

7. Fixed pre-season regulations are impossible due to the nature of the fishery.

8. In order to insure that exclusive treaty Indian fishing time can be provided, there must be a means by which this Court can order non-treaty commercial fishermen not to fish during times when treaty Indians are fishing.

9. A mechanism for authoritatively informing the fishermen of lawful fishing times must be established before the fishing season.

10. The mechanism provided for in the Government's proposed order is reasonable.

11. An allocation of the fishing opportunity between treaty and non-treaty fishermen, and enforcement of that allocation is an appropriate exercise of this Court's discretion. *Department of Game v. Puyallup Indian Tribe*, 414 U.S. 44 (1973); *Puyallup Indian Tribe v. Department of Game*, 97 S.Ct. 2626 (1977); *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975).

12. This Court has the authority and the duty to protect and effectuate its prior judgments. *Brown v. Board of Education*, 394 U.S. 294 (1955); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Doe v. Ceci*, 517 F.2d 1203 (7th Cir. 1975); *United States v. Texas*, 306 F. Supp. 469 (E.D. Texas 1972), *aff'd*, 495 F.2d 1250 (5th Cir. 1974); *Bullock v. United States*, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959).

13. This Court has broad discretion to fashion remedies which will protect and effectuate its earlier rulings, the more so when public interest and the rights of a large group of people are involved. *Virginia Railroad Co. v. System Federation*, 300 U.S. 515 (1937); *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168 (1973).

14. This Court is empowered to issue all writs necessary or appropriate in aid of its jurisdiction which are agreeable to the usages and principles of law. Title 28, United States Code, Section 1651.

15. This Court is empowered to punish disobedience or resistance of its lawful orders and decrees. Title 18, United States Code, Section 401.

16. In limited and extraordinary circumstances, this Court may enjoin individuals who are not formal parties to this action where they have notice of this Court's orders, they intentionally violate those orders, they are members of a class who cannot realistically be specified in advance of such violations, and their actions violate the rights of a large class of plaintiffs, interfere with the obligations and ability of defendants to comply with this Court's orders, create conditions of lawlessness and chaos in the community and interfere with this Court's ability to adjudicate the rights and responsibilities of the parties before it. *Kasper v. Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957); *Bullock v. United States*, *supra*; *United States v. Hall*, 472 F.2d (5th Cir. 1972); *N.L.R.B. v. Sunshine Mining Co.*, 125 F.2d 757 (9th Cir. 1942).

17. This Court may enjoin individuals who are not parties to the lawsuit when they are in privity with one of

the parties; that is, when the party is respresenting the interests and advocating the position of the non-party. *Puget Sound Gillnetters Association, et al. v. United States District Court*, ____ F.2d ____, No. 77-3129 (9th Cir., April 24, 1978); *City of Tacoma v. Taxpayer of Tacoma*, 357 U.S. 320, 340-1 (1957); *New Jersey v. New York*, 345 U.S. 369 (1953).

18. The orders of this Court directed toward the State of Washington are binding on its citizens. Such action is appropriate in this case because the litigation had adjudicated the right of the State of Washington to authorize the harvest of anadromous fish and the rights of all its citizens to harvest those fish. *Arizona v. California*, 373 U.S. 546 (1963); *City of Tacoma v. Taxpayers of Tacoma, supra*; *Wyoming v. Colorado*, 286 U.S. 494 (1932); *New Jersey v. New York, supra*; *Kentucky v. Indiana*, 28 U.S. 163 (1930).

19. The fact that the fishermen were not participants in the ligitation leading up to Final Decision 1 does not prevent them from being bound by it. The State of Washington represented, and continues to represent, all of the non-treaty fishermen in this litigation. *Puget Sound Gillnetters Ass'n, et al. v. United States District Court*, ____ F.2d ____, No. 77-3129 (9th Cir., April 24, 1978).

20. This Court may enjoin interference with property which is under the control of this Court, and punish violations of such injunctions. *Board of Governors v. Transamerica Corp.*, 184 F.2d 311 (9th Cir. 1950); *In re Lustron Corp.*, 184 F.2d 789, 798 (7th Cir. 1950), *cert. denied*, 340 U.S. 946 (1951); 7 J. Moore *Federal Practice* ¶65.12, n. 1 (1976); *State v. Terry*, 99 Wash. 1 (1917). THEREFORE, IT IS ORDERED that the injunction shall issue. DATED this 6th day of June, 1978.

/s/ _____
GEORGE H. BOLDT
Senior United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ODER RE: ENFORCEMENT OF LIMITATIONS ON NONTREATY SALMON FISHERIES FOR 1978 AND SUBSEQUENT SEASONS

June 6, 1978

The court has fully reviewed and carefully considered the Report of United States Magistrate Re: Preliminary Injunction Involving Enforcement of Limitations on Non-Indian Treaty Salmon Fisheries for 1978, the Findings of Fact, recommended Conclusions of Law and proposed Preliminary Injunction attached thereto; the transcripts of the hearings of April 5, 6 and 24, 1978; the objections filed to the Magistrate's proposed Findings, Conclusions and Injunction and the "Final Draft" of the proposed injunction served and filed by the United States.

Upon this review and consideration, the court hereby denies the requests of counsel for certain plaintiff tribes and also counsel for the Washington Reefnetters Association for an additional hearing on the matter of the issuance of a preliminary injunction. Moreover, the court has fully considered and hereby rejects the request of the State of Washington received this date for an additional hearing. The court is satisfied that an additional hearing would serve no useful purpose.

The court hereby adopts the Findings of Fact and Proposed Conclusions of Law lodged by United States Magistrate Robert E. Cooper May 4, 1978 as modified by this court. To the extent that a Finding of Fact may be in whole or in part a Conclusion of Law, or vice versa, it shall be considered to be either one, or the other, or in both categories.

The court also has signed this date a separate document entitled Preliminary Injunction Re: Enforcement of Limitations on Nontreaty Salmon Fisheries for 1978 and Subsequent Seasons.

IT IS HEREBY SO ORDERED this 6th day of June, 1978.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

PRELIMINARY INJUNCTION RE: ENFORCEMENT OF LIMITATIONS ON NONTREATY SALMON FISHERIES FOR 1978 AND SUBSEQUENT SEASONS

June 6, 1978

Upon the motion of the United States, together with the exhibits, the testimony of witnesses and the records and files of this case, the court finds that the State of Washington and its officers and agencies remain unwilling or unable to carry out the existing orders of this court and to prevent certain nontreaty fishermen from taking, under color of state law and in some cases in defiance thereof, salmon which under the orders of this court are to be left available for harvest by the plaintiff tribes and their members under reserved rights expressly secured by federal law.

The court further finds that this situation, if permitted to continue, will frustrate the decrees of this court, irreparably harm the plaintiff tribes and their members by substantially depriving them of their rights to harvest such salmon, imperil the perpetuation of the salmon resource and lead to a breakdown of law and order, and that to prevent such continuance, only direct action of this court, including the issuance of and enforcement of an injunction against certain nonparties, is required in the form and manner hereinafter set forth.

The court also finds that adequate public and/or personal notice of the hearing on the government's motion

for an injunction on this matter and an opportunity to be heard prior to the entry of any injunction was given to affected nonparties. The court finds that service of the notice and invitation to be heard was made by the United States Marshal's Service on some 2,445 persons who were State-licensed commercial net salmon fishermen for 1977, out of a total of 2,700. The court has considered all relevant points and authorities presented by such nonparties.

Therefore, it is hereby ODERED THAT:

1. Fishing in the waters of Puget Sound and other marine waters easterly of the Bonilla Point-Tatoosh Line (located at the western end of the Strait of Juan de Fuca) and their watersheds, all Olympic Peninsula watersheds, and all Grays Harbor and its watersheds is subject to the provisions of this order.

2. All gillnet, purse seine and reefnet fishermen licensed by the State of Washington, all other persons who attempt to net or assist in netting salmon in any portion of the waters described in paragraph 1, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, Grays Harbor Gillnetters Association, and all persons in active concert or participation with them, are hereby enjoined and prohibited from taking, attempting to take, or offering for sale, salmon of any species taken from such waters, or assisting in any of the foregoing, unless such person has, within the previous twenty-four hours, ascertained from the National Marine Fisheries Service telephone "hot-line" (toll free number: 1-800-562-5672) that such fishing in the area in which the individual intend to fish is not prohibited by this court at the time of such fishing, provided that this paragraph shall not apply to treaty Indians fishing pursuant to tribal regulations promulgated in accordance with the orders of this court. The National Marine Fisheries Service shall announce all lawful openings of nontreaty fishing and all lawful conservation closures on its "hot-line" and shall maintain a written copy of all such announcements for a period of at least 60 days beyond the end of the calendar year in which the announcement was made.

3. All fishermen described in paragraph 2 are hereby prohibited from possessing salmon of a particular species in any area in which at that time fishing for that species by such person is prohibited by paragraph 2 of this order; provided that this paragraph shall not prohibit fishermen from transporting salmon caught in an open area through a closed area for the purpose of selling the catch.

4. Personnel of the National Marine Fisheries Service, the Coast Guard, the United States Marshal's Service and the Washington Department of Fisheries and persons lawfully deputized by any such agency may board fishing vessels for the purpose of investigating suspected violations of this injunction.

5. At the direction of any enforcement agent described in paragraph 4, all persons described in paragraph 2 are hereby ordered to stop their vessels, permit boarding by enforcement agents, permit themselves and their vessels to be photographed, permit their catch to be examined, identify themselves and their vessels to the satisfaction of the boarding enforcement agents, and produce either a valid Washington Department of Fisheries net salmon fishing license or a valid treaty Indian identification card for the then-current fishing season which, by this order, all fishermen are required to carry when engaged in any salmon fishing activity described in paragraph 2. Any fisherman failing to identify himself as provided herein may be placed under arrest and shall be taken before a United States Magistrate for proceedings pursuant to Rule 5 of the Federal Rules of Criminal Procedure.

6. The United States, through the Coast Guard, the National Marine Fisheries Service, the United States Marshal's Service, and such other agencies as may be appropriate, may serve copies of this injunction and other relevant orders or process on fishermen described in paragraph 2. All Officers and Petty Officers of the United States Coast Guard and the National Marine Fisheries

Service assigned by their respective superiors to carry out the provisions of this order are hereby appointed as process servers and agents of the court within the meaning of Title 18, United States Code, Sections 1501 and 1509. The orders, citations and papers required to be served by enforcement agents under this order are found to be judicial writs and process of this court within the meaning of Title 18, United States Code, Sections 1501 and 1509.

7. The State of Washington and the United States are ordered to maintain reasonable surveillance of the fishing areas affected by this order and to cite any fishermen who, having had notice of this injunction, thereafter continues or engages in any act prohibited by paragraphs 2 or 3 of this injunction or fails to do any act required by paragraph 5, to appear before the United States District Court to be ordered to show cause why he should not be held in contempt.

8. Nothing in this order shall relieve the defendant State of Washington or its agencies, officers and employees of any obligation under prior orders of this court including, but not limited to, the obligation under paragraph 8 of the Injunction of March 22, 1974 (384 F. Supp. at 415-16), to diligently and vigorously enforce, as far as circumstances permit, their applicable statutes and regulations in order to safeguard the fish resources from depletion or destruction due to unlawful fishing by persons subject to the state's jurisdiction.

9. The issuance of this injunction is necessary to prevent irreparable injury to the plaintiff tribes and their members and to the salmon resource for which there is no adequate remedy at law.

10. The issuance of this injunction is necessary in aid of this court's jurisdiction and to protect or effectuate this court's judgments.

This injunction shall remain in effect until further order of this court.

IT IS HEREBY SO ORDERED this 6th day of June, 1978.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MINUTE ORDER

June 15, 1978

Now on this 15th day of June, 1978, the Court directs the Clerk to enter the following Minute Order:

Finding of Fact #16 was inadvertently included in the Findings of Fact filed by the Court on June 6, 1978.

Accordingly, said Finding of Fact is hereby stricken.

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The foregoing Minute Order was entered by Rosemary Freeny, Deputy Clerk in Charge, Tacoma Office of The Clerk by Direction of the Court, The Honorable George H. Boldt, Senior United States District Judge.

/s/ _____
JOE R. ROMANE, CLERK

U.S. v. WASHINGTON

District Court: No. 9213

MOTION FOR TEMPORARY RESTRAINING ORDER RE: STRAITS CONSERVATION CLOSURE

October 13, 1978

The Makah Tribe and the United States respectfully move this Court for an order temporarily restraining the State of Washington and the Washington State Department of Fisheries and all officials and employees of the State of Washington from enforcing its conservation closure, dated October 5, 1978, against any treaty Indians fishing pursuant to Tribal regulation in catch reporting areas 4B and 5.

This Motion is made on the following grounds:

1. After the State of Washington enacted its

conservation closure on all fishing in the Straits of Juan de Fuca, the Makah Tribe, pursuant to the orders of this Court, convened a meeting of the Fishery Advisory Board on Monday, October 9, to contest the State's assertion that said closure was required for conservation purposes. At the Fisheries Advisory Board meeting the Makah Tribe demonstrated that the total expected treaty catch of chum in areas 4B and 5 during the time that the runs which the State desires to protect are passing through would be approximately 2,000 fish. Of these number, the vast majority are Canadian origin chum and only approximately 400 (20%) are from Puget Sound stocks. Of this total, the Makah Tribe demonstrated that only 60 chum (15%) were among the Puget Sound chum in need of protection. These 60 fish represent such a small percentage of the total that there is no sound conservation basis for terminating the tribal fishery.

2. At the Fishery Advisory Board meeting the State representative advised that the State would authorize an all-citizen chum fishery in areas 7 and 7A. It was estimated that approximately 25,000 chum of Puget Sound origin will be taken in the all-citizen fishery of which approximately 15%, or in excess of 3500 chum, are from Puget Sound runs in need of protection.

3. Based on this technical data and other considerations, Dr. Whitney, the Court's Technical Advisor, pursuant to ¶6 of the Court's Memorandum Order and Preliminary Injunction Re: Salmon Allocation for 1978 and Subsequent Seasons, dated August 11, 1978, recommended that the State's conservation closure not be enforced against treaty fishing occuring in Areas 4B and 5 provided that the total Tribal harvest of chum during the period that the threatened runs are passing through the area do not exceed 2,000 fish. The Technical Advisor's recommendation was communicated to this Court, to the United States and to the Tribe.

4. On Friday, October 13, a telephone conference call

was held between Steven Anderson, undersigned Attorney for the Makah Tribe; Alan Stay, Attorney for the Lower Elwha Tribe of Klallam Indians; George Dysart, Attorney for the United States; and Jim Johnson, Attorney for the State of Washington. During the conference call Mr. Johnson advised counsel for the Tribes and the United States that the State had not been formally advised of Dr. Whitney's recommendation and would continue to enforce its conservation closure against any Indian fishermen fishing in Areas 4B or 5 pursuant to any Tribal regulation adopted pursuant to Dr. Whitney's recommendation.

5. The Makah Tribe has adopted a fishing regulation implementing Dr. Whitney's recommendation which authorizes treaty fishing in Areas 4B and 5 with a limitation that no more than 2,000 chum be taken during the time that the threatened runs are passing through those fishing areas.

6. In light of the fact that only approximately 60 chum from the Puget Sound runs that need protection will be caught by the treaty fishing in Areas 4B and 5, and in light of the fact that the Tribal chum fishery will be totally preempted in the event the State's conservation closure remains in effect, it is not reasonable and necessary for purposes of conservation that the State conservation closure be applied to the treaty tribes and the recommendation of the Court's Technical Advisor should be followed and the Indian treaty fishery allowed.

Therefore, for the reasons stated above, the Makah Tribe and the United States respectfully move this Court for an order enjoining the State from enforcing the conservation closure against the above described Indian treaty fishery. In addition to the grounds stated above, this Motion is supported by an attached memorandum and will be supplemented by an affidavit to be filed with the Court on the morning of October 16 before the hearing.

Respectfully submitted this 13th day of October, 1978.

ZIONTZ, PIRTLE, MORISSET
ERNSTOFF & CHESTNUT

/s/ _____
STEVEN S. ANDERSON
Of Counsel for the Makah Indian Tribe

JOHN C. MERKEL
United States Attorney

/s/ _____
BY GEORGE DYSART
Special Assistant to the United States Attorney

U.S. v. WASHINGTON

District Court: No. 9213

PRELIMINARY INJUNCTION RE: LIMITED CHUM FISHERY

November 3, 1978

The court having held a hearing on the motion of the United States and the Makah Tribe to restrain the State of Washington and its Department of Fisheries from enforcing its closure against treaty Indians in State of Washington Commercial Salmon Management and Catch Reporting Areas 4B and 5 and having called for and received further briefing from the parties, hereby Finds, Orders and Decrees as follows:

1. The defendants have failed to present any evidence that a limited treaty fishery as requested by the plaintiffs for said Areas 4B and 5 would have any meaningful impact on Puget Sound area salmon stocks for which no harvestable surplus is forecast to be available.

2. A fishery by treaty tribes in said Areas 4B and 5 limited as herein provided will afford those tribes an opportunity to harvest some of the harvestable surplus of Canadian-origin chum salmon that predominate in Areas 4B and 5 at this time.

3. The defendants have determined that a harvestable surplus exists with respect to these Canadian-origin chum salmon and have authorized an all-citizen fishery on said chum stocks, including a fishery in areas in which there will be very limited incidental catch of chum from U.S.-origin runs for which no harvestable surplus is forecast.

4. No evidence has been submitted to show that a total closure of treaty fishing in Areas 4B and 5 at this time is reasonable or necessary for the conservation of any stock of fish that would be affected by the fishery authorized herein.

Now, therefore, it is hereby ORDERED, ADJUDGED AND DECREED:

1. The Makah and Lower Elwha Tribes, having heretofore been found by this court to have treaty fishing grounds in State Commercial Salmon Management and Catch Reporting Areas 4B and 5, or either of them, may authorize a fishery for chum salmon in said Areas 4B and 5 to take not to exceed 2,000 chum salmon combined total for the two tribes.

2. The defendant State of Washington, its officers, agents, servants, employees, attorneys and all other persons in active concert or participation with them who have actual notice of this order, are hereby enjoined from restricting or interfering with the treaty fishery herein authorized.

3. The Fisheries Technical Advisor shall monitor the fishery herein authorized and immediately report to the court any indication that said fishery is having a meaningful impact on runs needing protection from harvest.

4. The parties, under the direction of the court's Fisheries Technical Advisor, shall further explore and report back to the court as to appropriate standards or

guidelines governing fisheries in mixed stock areas where there may be some impact on fish from runs which are not the target of the fishery.

Dated this 3rd day of November 1978.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

TESTIMONY POST 1974 IN U.S. V. WASH.
(U.S. DIST. CT. WESTERN WASH. # 9213)

Testimony of DONALD McKERNAN
July 11, 1975

And I have been heading the United States delegation in bilateral negotiations with Canada and expect to continue in that role at least through this year.

Q. And what is your position heading those negotiations with Canada?

A. I am Chief Negotiator for the United States Government. I should like to add, Your Honor, not representing the United States Government today. I am here as simply my individual capacity.

(Transcript of Proceedings, July 11, 1975, p. 131, l. 3-11)

A. There will be some informal discussions in August and formal negotiations with the Government of Canada will be held in late September. These negotiations are of longstanding nature. They have been, they are very complicated. They include not only renegotiation of the sockeye treaty, sockeye and pink salmon treaty, but they also include some additional disagreements and disputes involving the troll fisheries off the coast of Washington and British Columbia and they involve a dispute in the northern boundary where the United States fishermen in Alaska intercept some of the runs of salmon from Northern British Columbia, and in turn the Canadians intercept some of the chum salmon and pink salmon runs from Southeastern Alaska. So, we are really talking about the entire complex species of Pacific salmon from approximately the Columbia River to the northern end of the Southeastern Alaska.

Q. And the Fraser River runs managed and regulated by the International Pacific Salmon Fisheries Commission are part of that intricate negotiation?

A. Yes, they are.

(p. 132, lines 4-24)

Q. You have heard Mr. Moos testify why, in his opinion, the IPSFC has been so successful, its ability to singlehandedly regulate and rapidly regulate the fishery. Generally, what is your opinion of why the IPSFC has been so successful?

A. Well, I agree generally with what Mr. Moos has said, but in addition to this, the Commission has been blessed with outstanding directors and outstanding scientists and outstanding staff.

(p. 134, lines 13-21)

Q. Had the Commission's regulations in the past, to your knowledge, been adopted verbatim by Canada and the United States and enforced by those nations?

A. Yes.

Q. Do you know any instance where either government has repudiated those proposed regulations?

A. Not the national government, no.

Q. Have you heard Mr. Moos' testimony today?

A. Yes, all but a very small part of it.

Q. He has testified as to the possible disruption of his regulatory system with certain unilateral actions to be taken in this nation to affect the harvest of the fisheries. By the way, do you believe that Mr. Moos' categorization is correct, that possibly does exist?

A. Yes.

Q. What effect, in your opinion, would such a disruption have, or the perception of the Canadians that our unilateral actions have been violated somehow, of the Commission. What effect would that have, and I understand you can only speak in general terms of these negotiations, what effect would that have on your negotiations, these international negotiations with the nation of Canada?

A. Well, I, in the first place, I don't want to try and presume to know what Canada would do or would want to do; and secondly, I can assure you that I

would do my very best to minimize any adverse effects. But obviously a complication by one side or the other would have some effect on the other side. Once again, however, as a chief negotiator of this problem I would certainly do my best to minimize any effects and would try and put forward the best, in the very best light the United States action.

(p. 135, line 15 - p. 136, line 22)

Q. But in your view such disruption could cause problems in the international negotiations with Canada?

A. Yes.

(p. 137, lines 6-8)

Remarks of
HONORABLE GEORGE H. BOLDT,
U.S. District Court Judge
October 25, 1975

A factor that has been mentioned but not sufficiently emphasized in my opinion has been disturbing me deeply, not merely for the purposes of this case but for the dignity and honor of the people of this great, wonderful area where I have lived for 50 years. Mr. Moos told us that there have been 300 citations of non-treaty fishermen over a relatively short period, and that out of all of the 300 only one individual has been penalized by the civil and criminal processes of the state. We have indisputable evidence that substantial numbers of non-treaty fishermen willfully and deliberately have obstructed treaty fishermen to a very substantial extent, even in the period where they were entitled to exclusive fishery. This is outlaw fishing, and the Court can do nothing but condemn it as an arrogant and flagrant, as well as unlawful, effort to defeat the basic purposes and intent of *United States v. Washington*. I would be derelict in my duty if I did not recognize that

situation at an appropriate time. And this is an appropriate time because I am completely satisfied that the treaty take of chum, as well as other runs, has been substantially diminished from what it would have been had there not occurred this willful violation of the law and the failure to enforce the law.

(TR.,p.43, line 15 - p. 44, line 12)

Testimony of CHRISTOPHER DLUGOKENSKY,
Fisheries Management Biologist,
United States Fish & Wildlife Service

August 8, 1977

Q. (By Mr. Stay) Mr. Dlugokensky, will you tell the Court, please, where you are now employed?

A. I am employed by the United States Fish & Wildlife Service in Olympia.

THE COURT: Will you speak up, please.

THE WITNESS: I am employed by the United States Fish & Wildlife Service in Olympia.

Q. (By Mr. Stay) In what capacity?

A. Fisheries Management Biologist.

Q. And would you tell the Court where you received your formal education, if any?

A. I received my formal education from the Evergreen State College in Olympia, Washington.

Q. And did you graduate?

A. Yes, I did. I received a bachelor's degree.

Q. In what?

A. Population dynamics and fisheries biology.

(TR., p. 30, lines 5-22)

Q. Now, Mr. Dlugokensky, with regard to the coho problem you were asked to investigate, have you arrived at any conclusion as to the effect of the adopted State regulations as we have? Could you tell the Court?

A. Our conclusions are that there will not be the allocated treaty harvest of coho.

Q. You mean that the treaty fishermen will not be able to harvest their full allocation?

A. That is correct.

Q. And for chinook have you arrived at any conclusion?

A. The conclusion we have arrived at is that the nontreaty allocation for chinook has almost been reached in most cases.

Q. Has it been totally reached in any case?

A. Yes, it has.

(TR., p. 36, line 13 - p. 37, line 2)

Q. Now, Mr. Dlugokensky, what I would like to do now if I might is kindly go through your methodology in arriving at your conclusions that the coho regulations are in fact going to receive the treaty allocation. Now has the State proposed coho fishing within Puget Sound?

A. Yes, it has.

Q. And in what areas have they done it?

A. The State has proposed coho fishing in the various mixed stock areas, particularly in areas 6B and 9, which primarily I am dealing with, and in Southern Puget Sound areas 10 and 11, and also for Southern Puget Sound coho, the terminal areas; that being 10, Elliott Bay, 11A, Puyallup, Commencement Bay, 13A, Carr Inlet.

For Hood Canal stocks, there is a 6B and 9 mixed stock interception area for Snohomish-Stillaguamish stocks. There are harvest areas 6B and 9 and areas 8B and 8C. For Skagit stocks there are interceptions that will occur in areas 7 and 7A and in area 8. And for Nooksack-Samish stocks interceptions in area 7 and 7A, and the terminal fishery in area 7B and C.

Q. Would it be fair to say, Mr. Dlugokensky, that there are planned fisheries throughout Puget Sound?

A. Yes.

(TR., p. 37, line 15 - p. 38, line 12)

A. By stock. In this case, taking all of the run sizes, in this case 159,500 fish as they pass through, 24% of those fish will be intercepted in this 6B and 9 fishery before they reach the terminal areas A, B and C.

Q. And that will be the nontreaty, all-citizen fishery?

A. That is correct.

Q. And that is based upon the adopted State regulation?

A. That's right. We used — in determining which year to base past fishing effort and how we arrived at these figures, we used the 1973 year.

Q. Why was 1973 used as a basic year?

A. 1973 was used because the total run size of coho returning to Puget Sound was 850,000 fish. The projected 1977 return for all coho is 825,000 fish.

Q. Is there a similarity in the total coho run?

A. That is correct, and also the regulations which were in effect in 1973 are similar to the regulations that are in effect which are the exact regulations which are in effect in the mixed stock area for 1977.

(TR., p. 44, lines 5-24)

Q. Moving on to South Puget Sound stock, what have you determined to be the treaty and nontreaty allocation of coho bound for South Puget Sound areas?

A. We determined the treaty fishermen will take all of the harvestable and some of the escapement, almost all the escapement fish destined for South Puget Sound according to the regulations.

Q. The prior interceptions are what?

A. The prior interceptions of South Sound fish are 104,900 ocean interceptions.

Q. By nontreaty fishermen?

A. By nontreaty fishermen. In area 6B and 9, 75,400 fish, and in area 10 and 11, the mixed stocks, the interceptions of Southern Puget Sound coho will be 173,000 fish.

Q. May I ask for a correction. Did you mean the treaty or nontreaty fishermen would take all the available harvestable fish?

A. The nontreaty.

Q. So you have projected fisheries in the ocean in area 6B and 9, and areas 10 and 11. Are there other prescribed fishing areas and seasons under State regulations?

A. Besides the nonterminal harvest areas, there are also terminal harvest areas fisheries planned for area 10A, which is Elliott Bay, area 11A, Commencement Bay, and 13A, Carr Inlet.

Q. Based upon your analysis, how many fish do you anticipate the nontreaty fishermen will harvest under that basis?

A. Based upon our analysis, nontreaty fishermen will harvest all of the available fish.

(TR., p. 50, line 11 - p. 51, line 17)

Q. In 1973, Mr. Dlugokensky, you indicated that there were fisheries in the mixed stock area 6B, 9, 10 and 11. I assume some fish escaped to the terminal areas. Who harvested those?

A. The treaty fishermen.

Q. There was a treaty fishery in the river in 1973?

A. This is correct.

Q. Under the State proposed regulation, do you anticipate there being available fish for a treaty fishery in the rivers under those regulations?

A. Under the escapement of those regulations, there will be a minimal of no treaty harvest of fish in those rivers.

(TR., p. 52, line 15 - p. 53, line 2)

Q. (By Mr. Stay) Mr. Dlugokensky, again, this is a breakdown of the projected nontreaty harvest, based upon State adopted regulations?

A. That is correct.

Q. Would you describe for us what the figures show?

A. The figures show that there would be prior outside interceptions of 13,500 fish. In area 7 and 7A, interception on those stocks are approximately 2,700 fish. A terminal area harvest in area 8 of approximately 3,800 fish. The breakdown in the Skagit stocks —. The allocation is 14,100. The projected nontreaty harvest is 20,000 or 71%. Then the treaty harvest is 8,200 or 29% of the fish.

Q. From your analysis, Mr. Dlugokensky, did you find any run of coho where the treaty fishermen would have available to them their allocation as prescribed by this Court?

A. No, we did not.

Q. Are you familiar, Mr. Dlugokensky, with the size of the treaty fishing fleet and their ability to harvest fish?

A. I am.

Q. Have you studied the size of the fleet?

A. Yes, I have.

Q. And have you examined their previous catch per unit of effort fisheries?

A. That is correct.

(TR., p. 56, line 20 - p. 57, line 21)

Q. Do the treaty fishermen have the capacity of harvesting their allocation?

A. Yes, they do.

Q. If the treaty fishermen have to harvest in conjunction with the nontreaty fishermen, will they be able to take their allocation?

A. They will not.

Q. What are the reasons for that?

A. The relative size of the fleet and the catch per unit effort data between Indian and non-Indian fishermen. The nontreaty fishermen are still more efficient with their gear types.

(TR., p. 58, lines 12-23)

Q. (By Mr. Stay) Mr. Dlugokensky, I would like to clear up one part of your last testimony before we had the break. I asked you whether or not you had an opinion on the ability of treaty fishermen to harvest their allocation if these regulations were left in full force and effect. And could you repeat for the Court what that opinion was?

A. My opinion was that the fleet sizes of such disparity and there are more nontreaty fishermen than there are treaty fishermen. And the second point was that in many areas but not all the catch per unit effort is significantly higher on the nontreaty side.

Q. And that leads to what conclusion, then?

A. That leads to the conclusion that these regulations as they are proposed or have been adopted will not lead to treaty fishermen realizing their allocation.

(TR., p. 65, line 24 - p. 66, line 14)

Q. Moving now to the Stillaguamish-Snohomish system, which is the next page, would you indicate whether there is or is not an allowable harvest there?

A. Because of the significant ocean and sport interceptions of 3,600 fish, the treaty Indian share for Boldt allocations are 2,800 fish. We expect that the nontreaty fishermen will overharvest their allocation on the Stillaguamish-Snohomish stocks.

(TR., p. 69, lines 18-25)

Q. So that would you repeat, now, for the record, whether there is or is not a nontreaty harvestable

number remaining for harvest in the terminal area of the Stillaguamish-Snohomish?

A. There is not a harvestable nontreaty allocation of Snohomish-Stillaguamish stock.

Q. And the reason for that?

A. The reason for that is because of the ocean sport interceptions, which are projected to take more than the allocation.

(TR., p. 71, lines 15-24)

Q. So in summary, Mr. Dlugokensky, can you tell us what areas there is a predicted nontreaty harvest on the regulations where there is no allocation remaining? What areas are those?

A. That would be South Puget Sound and the Snohomish-Stillaguamish.

(TR., p. 72, lines 20-25)

Testimony of PHILIP R. MUNDY,
Tribal Biologist
August 8, 1977

Q. (By Mr. Stay) Mr. Mundy, will you describe to the Court where you are presently employed?

A. Would you repeat the question?

Q. Where are you presently employed?

A. Point No Point Treaty Council.

Q. And what are your responsibilities there?

A. My job title is fisheries program investigator. I coordinate the activities of the fishery biologists who work for the tribes of the Point No Point Treaty Council.

Q. Now, Mr. Mundy, could you describe for the Court you formal education in the fisheries area?

A. Yes, I have a Bachelor of Science degree from the University of Maryland, a Master of Science degree

from the University of Alabama. I currently am a Ph.D. candidate in fisheries at the University of Washington.

Q. Would you describe, please, your work experience in the fisheries area?

A. I worked in 1974-75 as a consultant to the managers of the Icelandic Salmon Fisheries as an employee of the United Nations. I worked in 1976 and this year as a consultant to the managers of the Crystal Bay Sockeye Salmon Fisheries, Alaska Department of Fish & Game. During the year I was employed as an advisor in the management of the Indian fisheries in the Point No Point Treaty Council area.

(TR., p. 96, line 15 - p. 97, line 24)

Q. And would you tell the Court upon what you base your opinion?

A. Well, as I see it here, the issue is whether or not the State regulations will provide the tribes that I represent the opportunity to harvest their fair share of the salmon. I think it is clear without going into detailed analysis, that should the State regulations be imposed or should they be allowed to stand, that we will not be able to harvest our fair share of the salmon. It is certainly clear in the case of the coho. It has been so stated by the Department of Fisheries. We will be precluded from harvesting our share in Hood Canal of the harvestable coho.

Q. Does this fishery, does it appear to resemble any other fishery which you are familiar with, either presently or historically?

A. Historically, this looks like pre-Boldt decision regulations. In other words, this makes no allowance or no exceptions for the Indian opportunity to harvest.

(TR., p. 113, line 12 - p. 114, line 5)

Testimony of WESLEY WHITNER,
Tribal Witness
August 8, 1977

Q. (By Mr. Stay) Mr. Whitener, are you a member of any Indian tribe?
A. Yes, sir, I am.
Q. What tribe is that?
A. The Squaxin Island tribe.
Q. And within the Squaxin Island tribe you hold an elective office?
A. Yes, sir, I do. I am a member of the Tribal Council.
Q. And on the Tribal Council do you have any particular duties?
A. Yes, I am tribal treasurer.
Q. In addition to your current tribal government obligations and duties, are you involved in any way in the fishing industry?
A. Yes, I fish myself. I am one of the tribal fishermen.
Q. How long have you been fishing?
A. Well, legally and illegally for a long time.
Q. Have you been fishing since this Court made it legal for you to fish off-reservation just like you had done before?
A. Beg pardon?
Q. Have you been fishing since 1974, at least?
A. Yes, sir.
Q. What kind of gear do you fish with, Mr. Whitener?
A. I use just a small skiff and handpulled gear.
Q. How big is your skiff?
A. Mine is 18 feet.
Q. And you say "handpulled gear", how does that work, how is that fishing gear used?

(TR., p. 121, line 23 - p. 122, line 25)

A. It is all by manual labor. You have to pull your gear and set it out the same way. It is an outboard motor.
Q. Are you familiar with the type of gear geneally used by Squaxin Island fishermen?
A. Yes, I am.
Q. Could you describe that generally for us. What kind of gear is generally used for the tribe?
A. The general use of gear that we have is all hand gear. There is a few not that have a couple of reels, but is all.
Q. Couple of —?
A. Reels.
Q. That is power reels?
A. Power reels, yes.
Q. Are you familiar with the projected fishery in Budd Inlet, area 13B for chinook?
A. Yes, sir.
Q. Could you tell me if you can what relative importance this chinook fishery has to the Squaxin Island tribe as compared to any other fishery, if you know?
A. It is of a real economic importance, and especially to those that make it their livelihood.
Q. And have you been able to calculate what the value of that fishery would be to you this year?

(TR., p. 123, line 1-25)

A. This year, yes. The value of the fish on the projection of 13,150 fish will be $295,875 for 90 fishermen. That would give an average of $3,287.
Q. So if you were able to take all of the available fish, it would average out to approximately $3,000 per fisherman.
A. That's right.
Q. Are all the fishermen the same type, Mr. Whitener? Are they all part-time or full time or what?
A. No, there is some that fish weekends. There are just

periodic fishermen that can get out when they can. Many of them have steady employment and they fish or — like myself, I am a retired Social Security, so I fish to —.

Q. So the figure you gave us of $3200 was an average of how much you get for fishing?

A. That's right.

Q. Now, what would happen in your opinion as a fishermen if the nontreaty fishery was allowed in that area?

A. It would really hurt.

Q. In what respect? How would it hurt?

A. Well, especially to the men who are fishing for a livelihood. It would wipe them out.

(TR., p. 124, line 1-23)

Testimony of GORDON SANDISON,
Director, Washington State
Department of Fisheries

August 8, 1977

THE WITNESS: Gordon Sandison, Olympia, Washington, Director of Fisheries. S-a-n-d-i-s-o-n.

DIRECT EXAMINATION

Q. (By Mr. Dysart) Mr. Sandison, I have asked the clerk to give you some documents that we may be referring to later so that you will have them in front of you. It won't be necessary right now.

Would you please state your present position, Mr. Sandison?

A. I am Director of the Washington State Department of Fisheries.

Q. And how long have you been director?

A. Six weeks.

(TR., p. 134, lines 11-25)

Q. Mr. Sandison, Exhibit 109 is a letter signed by you; is it not, to the Department of Ecology?

A. That is correct.

Q. With regard to an application of the Squaxin Island Indian tribe for a fish trap permit from the Corps of Engineers. Is it not correct that in that letter you recommended that the application be denied?

A. That is correct.

Q. And what is the reason that you state for denial of that application?

A. Because of the laws of the State of Washington; historically, initiative 77 that allowed all fish traps or fixed appliances except for test purposes.

Q. Were you aware when you wrote that letter that the statute which is cited by you, RCW 75.12.060 is a statute which this Court has specifically found to be not applicable to Indian treaty fishing and has specifically enjoined your predecessor and the State of Washington in general from applying in any manner so as to restrict or impair the Indian treaty fishery?

A. No, I guess — no, I didn't.

(TR., p. 143, lines 5-25)

Q. Well, that brings me to my next topic. Why was it, Mr. Sandison, in the case of the Lake Washington fishery that after your staff informed you that the reason for the June emergency closure; namely, an anticipated very low run no longer existed, and that there was in fact now at that time expected to be 44,000 surplus fish available for harvest — that number subsequently increased beyond that — but at that time 4,000— why was it that you then declined to lift that emergency closure which had been invoked at the time when the run forecast was a very low one?

A. What closure? You mean the —

Q. There was a closure of the Indian treaty fishery adopted by your predecessor in the early part of June, was there not, the first, I believe, week in early June, closing Lake Washington to all sockeye fishing, both treaty and nontreaty?

A. That's right, oh, all right, yes.

Q. The subsequently, as the run actually entered the lake and as the counts came through the Ballard Lock and they got better, your staff then ascertained that the original prediction was understated and that, in fact, there were estimated at that time to be 44,000 surplus; is that correct?

A. That is correct.

Q. By July 14. And at that time, is it not correct that you issued an emergency regulation opening a sport fishery because of the surplus and the need for harvest?

A. That is correct.

Q. Why did you not similarly lift the emergency closure on the treaty Indian fishery at that time?

A. Because again there was a statute of the State of Washington which did not permit commercial fishing in Lake Washington.

Q. Has that statute been subsequently changed or repealed?

A. It hasn't been repealed, it has been overruled.

Q. By whom?

A. By this Court.

Q. Had it been overruled at the time you did finally lift the emergency closure on the morning of July 21?

A. No, we lifted it first as I recall.

Q. Why did you feel you could lift it on July 21st and not on July 14th?

A. I think probably — and so many things happened, and my recollection may be faulty. We just didn't get around to talking about it a couple days before.

Q. Now, who do you mean by "we" didn't get around to talking about it? Do you know whether your staff got around to talking about it? Wasn't the subject brought up before the Fisheries Advisory Board of this Court?

A. I have no knowledge of that. I have had no discourse with them over this.

Q. You were not aware that a request had been made for the lifting of that closure; you, personally, you personally were not aware that a request had been made to lift that closure and that that request was then brought to the Fisheries Advisory Board, and that your representative on that board declined to recommend —?

A. I knew that he declined to lift it. And it was one of those things that we were going to talk about and really didn't get to, I suppose. I don't even remember who the representative on the board was.

Q. Did he do that pursuant to instructions from you, or was that done on his own?

A. I don't recall speaking to him prior to his going to the meeting.

(TR., 150, line 6 - p. 152, line 21)

Q. Paragraph number five, the interim plan. Defendants will make significant reductions in the non-Indian fishery as are necessary to achieve the ultimate objectives of this Court's decision without requiring mathematical precision. But in making such reductions will do so consistent with the concept of permitting the full harvest of the fish. Have you made specific reductions in order to achieve the objectives of the Court's decision?

A. No, we haven't, based on the ruling of the Washington Supreme Court.

(TR., p. 161, line 20 - p. 162, line 5)

Q. (By Mr. Stay.) Mr. Sandison, Mr. Dysart talked to you a moment about some State statutes which were specifically enjoined by this Court in Final Decision No. 1 way back in February of 1974. You indicated that you have read them or were familiar with them.

Is it your position that they are not to be enforced against treaty fishermen?

A. First let me say the fact that I read them doesn't make me familiar with them. I am reading a great many things all day long. And I probably do not have the world's most retentive memory. Enforcing the law is one of those things where, again, I will not make a move until I have been able to work with counsel. I know fully well that because of the Washington Supreme Court decision that if the Department of Fisheries was to arrest a non-Indian fisherman we probably couldn't get a conviction in any of the State courts. So each question has to be taken into consideration on its own merits.

Q. So you are telling me today that you cannot tell this Court whether or not you would or would not enforce statutes which have been specifically enjoined by this Court against treaty fishermen. You can't answer that question yes or no?

A. No, I cannot answer it yes or no.

(P. 170, line 14 - p. 171, line 13)

Remarks of JAMES M. JOHNSON,
Assistant Attorney General,
Washington State Departments
of Fisheries and Game

August 26, 1977

I do wish the Prosecutor was here, Your Honor, because as the Prosecutor, he could tell the court the probability in the event you order the State to enact and enforce some regulations. A prosecutor could tell this court, perhaps more convincingly than I have argued, the

probability of a prosecutor in the State of Washington prosecuting for such violations of such order, which I think is very low. And if prosecution were undertaken by a prosecutor, the probability of ever achieving a conviction, which is even lower yet.

(TR., p. 31, lines 9-18)

Testimony of WAYNE C. LEWIS,
Special Agent in Charge of Enforcement,
National Marine Fisheries Service

September 22, 1977

Q. Mr. Lewis, what is your occupation?

A. Special agent in charge of the Enforcement Division of the National Marine Fisheries Service.

Q. Mr. Lewis, in that capacity, have you been responsible for the enforcement, on the federal side, at least, of the temporary restraining order which was entered by Judge Boldt on August the 31st in this case?

A. Yes, I am.

(TR., p. 14, lines 15-22)

Q. What was the level, what was the number of boats that your agents saw fishing on the weekend of September the 2nd, the whole Labor Day weekend?

A. I am really not certain. That was an open area to Indian fishermen. There were several Indian fishermen in the area, and they did board the vessels and determined that they were, in fact, Indians.

Q. How many notices were served that first weekend?

A. Approximately seven.

Q. Okay, was it your feeling that you had reached all the boats that were fishing illegally that weekend with the seven notices?

A. Yes.

(TR., p. 16, lines 1-13)

Q. The following weekend, which would have been the weekend starting September the 9th, did you receive any help on your patrol from the State of Washington Department of Fisheries?

A. The state offered its assistance in the form of aerial patrols. I believe they were conducting daily aerial patrols of the fishing area. And there was an exchange of information as to the number of vessels that they sighted.

(TR., p. 17, lines 8-16)

Q. Did you receive assistance last night from the state of Washington as far as serving —

A. Sandy Miller, Chief of the Washington Fisheries Patrol, called me yesterday afternoon and said that they would have a vessel patrolling the Vashon Island area and they would be serving notices. We received a report this morning from Olympia that the state had in fact served five notices last night.

(TR., p. 19, line 19 - p. 20, line 1)

Q. Mr. Lewis, have you or have any of your enforcement officers had any occasion, any responses from nontreaty fishermen as to what their feelings about Judge Boldt's order is?

A. Yes.

Q. Could you briefly summarize those for us?

A. Briefly, the non-Indian fishermen are extremely upset about the way that they feel they are being treated by their government, feel that they are being treated unfairly. And I would say approximately one-fourth of them have told us they are going to fish in violation of any Court order.

Q. One-fourth of them have said they are going to violate any order of this Court?

A. That restricts their fishing and makes the distinction between the fishing seasons based on ethnic origin.

Q. I see. You indicated that on the morning of the 21st, Tuesday night, Wednesday morning, that a large number of nontreaty fishermen returned to the docks in the Seattle area, apparently having fished that night?

A. That is in the Port Townsend area.

Q. Port Townsend area. Can you describe for us what the scene at the dock was; what the reaction of, the feelings of the nontreaty fishermen there seemed to be?

A. As reported to me, and this is hearsay, it was a carnival atmosphere, laughing and joking. There were several tons of fish being loaded by the fishermen.

(TR., p. 22, line 12 - p. 23, line 13)

Q. And if I understand you correctly, you have been stopping — your officers have been stopping nontreaty fishermen and serving them copies of that order?

A. Yes.

Q. The order directs you in paragraph three to draft and serve copies of a notice upon any fisherman fishing in violation of these closures. Where in that order do you find a directive from the Court that you should stop legal fishing in order to serve copies of that order?

A. We do not stop legal fishing. We have boarded vessels that have been engaged in fishing during an open season. It has been the interpretation of the United States attorney that the purpose is to serve notice on the fishermen of the Court order, and to do that during the open and closed season.

Q. And the United States attorney has told you you could do that even though they are fishing legally?

A. Yes.

Q. Despite the fact the order directs you to serve it only on illegal fishing?

A. Yes.

(TR., p. 24, lines 4-25)

Q. To your knowledge, have these tribal or BIA officers or any of them participated in the efforts of serving notice or citations of violation of this Court's order?

A. No, and specifically, I have requested that they do not.

Q. You asked that they do not?

A. Yes.

Q. Why is that, Mr. Lewis?

A. Because we have had several threats by non-Indians over the telephone, and exchanges between our officers that the first Indian that boarded their vessel, they are going to shoot them. And what we have been attempting to do all summer long is keep the level of confrontation at a minimum. And we have requested the Indians not to board non-Indian boats.

Q. Have you had similar threats to your officers?

A. Yes.

Q. Do you know if similar threats have been directed to the state officers?

A. No, I don't know.

(TR., p. 31, lines 7-25)

Q. (By Mr. Johnson) Let's see, Mr. Lewis, you mentioned that you do receive notice of violations observed by Fisheries patrol or Fisheries planes, is that correct?

A. Yes.

Q. Have you received notice of such violations in the South Sound or Vashon Island area?

A. Yes.

Q. And how often have you received such notice?

A. (No response.)

Q. About how many times, if you recall?

A. We get a report from the — from Sandy Miller's office daily, approximately 8:30 a.m. And he informs us of what the state observed the night before.

(TR., p. 38, lines 7-20)

Testimony of WINFIELD "SANDY" MILLER,
Chief of Fisheries Patrol,
Washington Department of Fisheries

September 22, 1977

Q. (By Mr. Sim) Mr. Miller, if the Court takes no action this weekend which continues or creates some kind of restraining order as to the fishery, will the Department of Fisheries issue citations under state regulations to fishermen fishing illegally?

A. In view of the State Supreme Court decision, I would say no.

(TR., p. 65, lines 19-24)

Remarks of The Honorable GEORGE BOLDT,
District Judge,
Western District of Washington

October 25, 1975

THE COURT: First, I wish to make it clear that in my judgment, particularly during the last several months or year, I believe that the State Fisheries Department has made a bona fide and genuine effort to begin the enormously difficult problem of putting *United States v. Washington* into effect. If we did not know it otherwise, newspaper accounts almost every day show what an extremely difficult task has been layed upon the Fisheries Department. Of course, heavy tasks have been laid upon others as well, including the treaty Indians. Thus, in what I will say further, I mean no discredit in any way to anyone excepting those whom I will specifically refer to in a moment.

(TR., p. 42, line 21 - p. 43, line 7)

Testimony of LYLE L. NELSON,
Patrol Sergeant,
Washington Department of Fisheries
March 28, 1978

Q. Have you had any difficulties getting successful prosecutions on those citations?

A. I think, as I recall, we either got prosecutions on all cases or they were bail forfeiture type situations. As I said, they were minor infringements versus large.

Q. How would the change, or would the change to managing the fishery on a quota basis affect the days on which you would patrol or your men are patrolling?

A. How would it affect the days?

Q. Yes, or would it affect the days.

A. I am not sure I understand your question. If it was managed on a quota basis we, of course, would be patrolling on open days as well as closed days to make sure that either the opening and closing hours are abided by or the fact that no one fishes on a closed day. The normal patrol-type activity.

Q. Is it your understanding that the days to be fished have been agreed upon the two sides?

A. Yes.

Q. And do you know of any difference in the days to be fished under a quota basis management, different from an allocation basis management?

A. The only days I have become familiar with are the Monday, Wednesday, Thursday concept.

Q. To what extent, if any, then, will the change — assuming there is a change made to a quota basis management, to what extent, if any, will that affect your enforcement activities?

(TR., p. 179, line 1 - p. 180, line 3)

A. I am assuming you are meaning changing from the present allocation situation to a quota situation. Well, this, of course, will have a definite effect upon the enforcement because the allocation, of course, we have been told by the State Supreme Court several times, we cannot adopt or promulgate regulations based upon allocations. It has to be strictly conservation. Due to this fact, we have had prosecutors, namely the prosecutor in Whatcom County as well as the Judge in Whatcom County advise us that they will not prosecute cases based upon allocation. And this, of course, throws a very definite wrench into the works, so to speak, from an enforcement standpoint. If we go into the concept as we were discussing that —

Q. May I stop you there? Have they advised you of that point personally, the Judge and the Prosecutor?

A. Yes.

Q. On more than one occasion?

A. Yes.

Q. When would some of those have taken place?

A. Oh, over the past, since the advent of the Boldt decision. Of course, the first year was no problem. Then we started getting into the allocation issues. And I am sure as we are all aware, many salmon violations that were cited were of course dismissed by various courts throughout Puget Sound based upon the allocations. And Whatcom County, of course, was one of them.

Mr. McKechron, the Prosecutor, has told us that he will not prosecute the cases based upon allocation.

Q. Were any of the six or eight nontreaty fishermen whom you have cited in the last three years cited for allocation closures, for violation of allocation closures?

A. No, as I recall the ones we have cited have either been failure to display their pennant or were on the fishing

grounds without their license, kinds of things like this.

(TR., p. 180, line 4 - p. 181, line 12)

Q. Do you have any reason to believe any other fishermen intend to violate allocation closures this year?

A. Just based upon conversations that I have either heard directly or secondary that the possibility is there, yes.

Q. How many fishermen have you talked to directly about that who engage in the herring fishery?

A. Oh, three, maybe four different individuals.

Q. Could you recount the substance of the conversations, what exactly have they threatened to do?

A. No threats as such. Of course, it has been the type of discussion that you would have with an individual over a cup of coffee. And during that period of time, they voice their disgust with the total allocation issue and voice the fact that they are getting kind of fed up with it themselves. And they might quit being one of those that stays on the beach while everybody else goes fishing, this type of thing.

MR. SCHLOSSER: I don't think I have any further questions.

CROSS-EXAMINATION

Q. (By Mr. Dysart) Sergeant Nelson, pursuing a little further this matter about the prosecutors advising you. You say Mr. McKechron, the Prosecutor, advised you of this?

A. Yes.

Q. Are you the senior Washington Department of Fisheries enforcement officer for that area?

A. For the district, yes.

Q. He told you personally this?

A. Yes. And I was told in his office one day. He has told both Officer Phillips and Officer Osmondson, who is now in Olympia. He has told them directly that he didn't want any more allocation cases brought in.

(TR., p. 181, line 13 - p. 182, line 20)

Q. Now, when you bring in a case of a violation, there is nothing on there that reflects it is an allocation case, is there?

A. Not on the citation itself.

Q. What does the citation show?

A. The citation, well, of course, show the violation that took place. The wordage could be "did unlawfully take and fish for salmon for commercial purposes with a gill net." And also on the citation will be either the WAC number of the RCW or possibly the order number of the emergency regulation that may have been effective during that particular fishery.

Once the respective prosecutor, whoever he may be, in this case, Mr. McKechron in Whatcom County, sees what the order number is for the emergency regulation which, during most of officiaries, we operate on emergency regulations — if he sees what order number it is, reads that emergency regulation, and it is very obvious upon reading the regulation to establish whether or not it is an allocation regulation. And that is where he makes his decision. In other words, if one fishery user group, be it treaty or nontreaty, has been stopped or curtailed to allow the other group to catch their fair share, so to speak, then we get into the allocation issue.

Q. But the citation is essentially fishing in a closed season?

A. Closed season, closed area, whatever, yes.

Q. Now, you mention Judges have told you this. Are these District Court Judges or Superior Court Judges?

(TR., p. 182, line 21 - p. 183, line 25)

A. This was a District Court Judge.
Q. And on what occasion did he tell you this?
A. Well, this has been, two, three years ago when they first started getting into the problem with the salmon fishery.
Q. Before the Washington Supreme Court decisions of 1977?
A. Yes, yes.
Q. And what did he give as the basis for telling you that?
A. Basically, there again, the same thing, the allocation issue that we in fact did not, the Department of Fisheries or the Director of Fisheries did not have the authority to promulgate regulations based upon allocation.
Q. Did he make any ruling in a Court to that, or did he just tell you out of Court?
A. No, as I recall, we had a number of fishermen in the courtroom at the time for fishing violations. And it was based a blanket dismissal, based upon that fact.
Q. So it was an actual ruling in a court case, it was not just a conversation the Judge had?
A. No, this was in the courtroom, yes.
Q. Do you by any chance recall the name of the case or the time?
A. Right off hand I don't. It was in Whatcom County.
Q. It was in Whatcom County District Court. Have you ever heard a Superior Court Judge in Whatcom County take that position, also?
A. No.
Q. And you say that was several years ago. When was the time that the Prosecuting Attorney, when was the most recent time the Prosecuting Attorney told you this?
A. Fall of 77.
Q. Fall of 77?
A. Yes.

(TR., p. 184, line 1 - p. 185, line 8)

Q. Now, you say he looks at the order and determines whether it is going to be deemed an allocation closure. What do you do as an enforcement officer, and you have an officiary directive that says either that particular area is closed or that particular day is closed? What do you do to determine whether that is an allocation closure that you were told not to prosecute or to prosecute or that it may be some other type of closure that you should bring to the prosecutor? How do you make that distinction?
A. Well, if it is a conservation closure, it is very obvious. It states on the regulation or the emergency order, this order shall be closed to treaty and nontreaty fishermen from this point forward, so to speak. This clearly is a conservation that is closed to everyone. If the order reads in such a manner that it states that treaty fishermen only or nontreaty fishermen only may fish area 7C from August 1 through August 10, these are all hypothetical. This shows me or tells me through years of experience that this is in fact an allocation issue.

I will make the respective prosecutor, whoever he may be, Whatcom County, Skagit, San Juan, aware of the problem.

Due to the allocation issue, our normal enforcement action during the past two or three years has been to physically go out on the fishing grounds. And if, in fact, someone is fishing in violation of the order, the allocation order, we attempt to identify the individual, boat name, boat numbers, was his gear in the water, how many fish did he catch, where he was fishing, and approximately to a geographic location, pretty much get all the why, what, when and where type facts, put this in writing and then present it to the respective prosecutor. And then if he, of course, feels like prosecuting, we do. If he doesn't, well then

(TR., p. 185, line 9 - p. 186, line 18)

Q. Now, under the Washington regulatory pattern, isn't it true that the regulations are named in terms of fishing is open or, examples being given here, Monday, Wednesday, and Thursday, from certain hours rather than fishing is closed during —

A. Yes.

Q. So the order is going to reflect that fishing is open?

A. That is correct, yes.

Q. And if it is not during one of those days that fishing is open, then it is closed?

A. Then it is closed.

Q. By standard regulation, permanent regulations of the department; is that not true?

A. Yes.

(TR., p. 186, line 19 - p. 187, line 7)

Testimony of GEORGE E. MARSHALL,
Deputy Special Agent, Northwest Region,
National Marine Fisheries Service

April 5, 1978

Q. Mr. Marshall, did you have discussions with the State Department of Fisheries enforcement officers regarding what types of enforcement operations they would assist in and which ones they would not assist in during 1977?

A. Yes.

Q. Could you tell us, please, what operations they were willing to assist in and which ones they were not willing to assist in?

A. Generally, they indicated that they could not participate in allocation closures, that they were enforcing conservation closures but not allocation closures, and that they were not going to hand out the notices such as we were, the notice and the citations.

Q. Did the State Department of Fisheries to your knowledge serve notices pursuant to the, either the

temporary restraining order or preliminary injunction?

A. I have no knowledge that they did, and the indication to me was that they did not.

Q. And how about citations pursuant to any of those three orders?

A. No, I am not aware of any they served.

Q. Excuse me. Did I interrupt you?

A. No.

Q. Mr. Marshall, when you indicate conservation and allocation closures, by allocation closures do you refer to those closures which are directed only against nontreaty Indians?

A. Yes.

Q. So those would be closures during times when the treaty Indians are permitted to fish and nontreaty persons are not permitted to fish?

A. Yes. That is correct.

(TR., p. 93, line 1 - p. 94, line 7)

Testimony of DAVID GIBLER,
Senior Resident Agent, Seattle,
National Marine Fisheries Service

April 5, 1978

Q. Mr. Gibler, how are you employed?

A. National Marine Fisheries Service.

Q. And in what capacity?

A. My title is Senior Resident Agent. I am stationed in Seattle.

Q. Mr. Gibler, during the 1977 salmon fishing season, were you involved in South Sound enforcement under the provisions of the three different orders of this Court?

A. Yes, I was.

Q. And what was your relationship with the enforcement effort under those orders?

A. Well, I assisted in some manner or degree in planning the patrols. And basically, the on-scene supervision as well as actually delivering notices and boarding vessels.

Q. All right. You were an on-the-water supervisor?

A. Yes.

Q. During most of this time?

A. Yes.

Q. When notices were being served on fishing vessels and citations were being issued, when they were fishing contrary to regulations, how long would the contact you would make with the vessels usually take?

A. Just serving the notice might be, maybe take 15 minutes at the most, depending a little bit on the individual fisherman. When the notice was served, pertinent parts were explained to him, we asked if he had any questions. If he had any questions, those were explained. So it varied a little bit.

Q. Mr. Gibler, did it take longer when you were issuing citations?

A. Yes.

Q. And about how long did it take?

A. Probably a half hour or twenty minutes.

Q. During the period of time that you were either serving a notice on one vessel or issuing a citation on a vessel, what in your experience were the other fishing vessels who may be in the area doing?

A. They generally left.

Q. Is it fair, then, to say that when you would make one enforcement contact in an area, that would have been the only vessel you would be able to catch in that area?

A. Generally, that is true. Sometimes fishermen generally seem to communicate among groups. If you have

a group from one port, they generally communicate, and a group from another port may not be communicating. That is particularly true on the CB channel, so you might come into an area and board one boat that happened to be from Port Ludlow and be able to board on another boat from another area. Sometimes, you move down to Hood Canal and another group would move in behind you while you were down there and wouldn't realize you were there.

Q. Mr. Gibler, you have made some mention of CB radios. Can you explain what you mean by CB radio?

A. Most of the fishing vessels are equipped with a citizens band radio. And there is quite a bit of communication back and forth, and they also apparently have some ground station as to the Coast Guard cutters, or patrols that are in the area.

Q. That is for the positions of those?

A. Yes.

Q. And in your enforcement efforts, did you have occasion to monitor these CB radios?

A. Yes.

Q. Did you have occasion where you would hear references on the CB radios of the enforcement efforts that you were undertaking?

A. Yes.

Q. Mr. Gibler, approximately how many other situations where you were either serving a notice or citation were you personally involved in the 1977 enforcement scene?

A. I don't really know. I just, somewhat guessing, I suppose maybe 50 to 75 of the notices and maybe 10 of the citations.

Q. Okay. So somewhere between 60 and 85 contacts where you were dealing with a boat out on the water?

A. Yes.

Q. And of these contacts, what relation would that number of contacts be to the number of boats you

actually saw fishing during closed times during the 1977 season?

A. Oh, I would say it was probably two or three times as many that we saw in the area that would leave before we could get on board.

Q. Mr. Gibler, when you are having these enforcement contacts with commercial fishermen, did any of them make statements to you indicating their intention to fish at any time the Indians were permitted to fish?

A. Yes, sir.

(TR., p. 116, line 1 - p. 119, line 14)

Testimony of WINFIELD "SANDY" MILLER
Chief of Fisheries Patrol
Washington State Department of Fisheries
April 5, 1978

Q. Mr. Miller, what is your occupation?

A. I am the Chief of Washington State Fisheries Patrol.

Q. And how long have you had that position, Mr. Miller?

A. Since July of 1977.

Q. Approximately nine months?

A. Yes.

Q. What was your position before that?

A. Assistant Chief.

Q. All right, now, how long were you Assistant Chief?

A. About two years.

Q. And how long have you totally been involved in fisheries enforcement in the State of Washington?

A. Twenty-five years.

Q. All with the Washington State Department of Fisheries?

A. Yes.

Q. Mr. Miller, during 1977, August and September of 1977, did you become aware of certain orders of this

Court directing enforcement directed against individual fishermen?

A. Yes.

Q. Was the State of Washington directed to undertake certain enforcement responsibilities pursuant to those orders?

A. Were we directed to?

Q. Yes.

A. By injunction?

Q. Yes.

A. Yes.

Q. Pursuant to the orders of this Court, did you issue orders to the enforcement persons subordinate to you with regard to what actions they should take?

A. Yes.

Q. What orders did you issue to the people who worked with you with regard to their issuing citations for contempt of court?

A. That we wouldn't participate directly in that action.

THE MAGISTRATE: Excuse me just one minute, Mr. Miller. Can you speak up just a little more. It is difficult to catch your words.

Q. That is, Washington State Department of Fisheries enforcement officers would not issue contempt citations?

A. Yes.

Q. What orders did you issue to the men who worked with you in regard to the service of notices of the preliminary injunction and the temporary restraining orders?

A. We did participate initially in posting of some notices.

Q. Posting of some of the notices?

A. Yes.

Q. And where did this posting occur?

A. In the Port Townsend area.

Q. Did you participate at all in personally serving the notices on any of the fishermen?

A. No.

Q. When I say "you" I am speaking of the Department of Fisheries.

A. No.

Q. With regard to the enforcement of what is referred to as allocation closures, did you give any orders to the men who worked there?

A. No.

Q. You did not.

A. Allocation areas?

Q. Yes. Let me ask the question a different way. What did you tell your men to do with regard to the enforcement of closures on allocation?

A. Our efforts were concentrated almost entirely on conservation closures.

Q. Now, Mr. Miller, during 1977, the Washington State Department of Fisheries did, at the direction of the Federal Court, enact several regulations which in essence allocated fish so that the treaty Indians could get a larger share than they otherwise would have done; is that correct?

A. I am a little bit — I won't be able to testify to that.

Q. Were there regulations which were promulgated by the Director of the Department of Fisheries which allows particular areas to be open for treaty Indian fishing but closed it for all other fishing?

A. Yes.

Q. And what, if any, enforcement actions did your men take with regard to those types of regulations?

A. None.

Q. And why was that?

A. We were precluded from having this authority by the Washington State Supreme Court.

Q. Mr. Miller, what has been your experience in the past

with regard to the ability to obtain convictions in cases where you had cited someone under Washington State regulations for an allocation closure?

A. It was difficult to obtain a conviction in the state courts.

(TR., p. 132, line 22 - p. 136, line 11)

Q. I will start over. I will abandon your other testimony and ask my question. During the 1976 fishing season, was your department's policy to issue citations for allocation closures?

A. Yes.

Q. And did you issue any such citations?

A. Yes, we did.

Q. And what was the — did you have any difficulty enforcing those in state court?

A. We had difficulty in obtaining convictions in state court.

Q. Is it not true that citations were thrown out on the basis that the Washington State Department of Fisheries did not have authority; that is, in the view of the Washington Supreme Court, to issue regulations which closed non-treaty fishing but left treaty fishing open?

A. Some of them were, yes.

Q. Was that also not true during the 1975 fishing season?

A. Yes.

Q. You indicated that your instructions or your department's instructions during 1977 were that you would not participate in enforcement of this court's orders; that is, you would not issue citations for violations of allocation closures. Is that what you testified to earlier?

A. Yes.

Q. And that is to say, that you would not issue citations in situations where fishing was closed to non-treaty fishermen but remained open to treaty fishermen?

A. Yes.

Q. Is there any reason why you policy during 1978 season would change in that regard?

A. No.

(TR., p. 145, line 1 - p. 146, line 6)

Testimony of SAMUEL G. WRIGHT,
Chief of Harvest Management Division,
Washington State Department of Fisheries
April 5-6, 1978

Q. (By Mr. Schlosser.) Would you give us an opinion, if you have one, as to whether the tribes at this time have a large enough fishing fleet to take 50 percent of the harvestable off reservation catch to take 50 percent of harvestable catch, if they fish only at the same time and places as the non-treaty fleet?

A. No, I think generally they don't in most areas. There is exceptions.

(TR., p. 155, lines 8-15)

Q. Could you give us an idea of the approximate share of the harvest taken by the various gear types in say, 1976, by the gear types; I mean just purse seines, gillnet, troll and sport?

A. Well, it differs quite a bit by species. In the case of chinook salmon in Puget Sound, the majority of the catch of the non-treaty share would be by sports. This grades all the way into chum salmon, where almost the entire catch would be taken by net fishermen.

Coho would be predominantly net fishery. But still significant performed by the sports fishery.

(TR., p. 169, lines 3-13)

Q. Well, in directing your staff to provide you figures on the size of the run and the size of the harvest, you also

attempt to monitor or quantify what illegal fishery is going on?

A. That is correct.

Q. Has there been considerable illegal fishing in the past several years, Mr. Wright?

A. Yes, there has been substantial fishing.

Q. Last year, the Federal Court issued an order similar to that which is sought in this proceeding. Did the illegal fishing last year after that court order was adopted, was it increased over the year before, or was it decreased?

A. Yes, 1977 was substantially worse than 76.

Q. I want to be sure we are getting this conclusion on the record. Are you saying that during the season after the Federal Court issued the injunction such as that sought here, the illegal fishing activity actually increased over what it had been in previous years?

A. Yes. I would say there was a bigger illegal catch in 77 than there was in the previous year or in any previous year, actually.

Q. Do you have any input, any influence, into the efforts made by the Department's enforcement officers and the priorities they place on the kind of regulations which they try to enforce?

A. Yes. We make flights with them, check on that. We tell them what the situation is, whether it's a conservation or allocation system.

(TR., p. 206, line 14 - p. 207, line 16)

Q. In conclusion, let's turn to that problem for a moment. Mr. Dysart asked you some hypothetical questions in dealing with runs being 15 percent, I believe, below predictions. When you identify a run that actually is below the level necessary for spawning escapement, do you as a normal course take effort to close all fisheries on those runs, sports and commercial?

A. Yes. On a run that is really down, yes.

(TR., p. 208, line 20 - p. 209, line 2)

Q. What elements go into the harvest of salmon by a gillnet fisherman? That is probably too general for you to understand what aspects of fishing contribute materially to the ability to harvest fish by a gillnet fisherman.

MR. SIM: I am going to object. I just don't see the relevancy of this line of questioning.

THE MAGISTRATE: Well, I will reserve ruling on it. And I presume that you will tie it up some way with the questions involved here.

MR. YATES: Yes, sir.

THE MAGISTRATE: All right.

MR. YATES: This is an offer of proof. I will tie it up to the opinion of this particular witness elicited by the government as to whether or not the treaty Indians are capable of harvesting their share of the fish.

THE MAGISTRATE: You may proceed.

Q. (By Mr. Yates.) Did you understand?

A. Yes, it is a whole range of things, how — the guy's experience, his gear, how hard he wants to work, a certain amount of luck, obviously. But there is, you know, there is some fishermen that consistently do well, and there is some fishermen that fish very hard, and there is some that do both, and there is the opposite end of the scale.

Q. Would it be fair to say that the willingness to work and the skill in fishing are the two major primary components in a successful harvest of salmon, of all the components that go into it?

A. Well, if everybody had the same gear, then obviously skill and ambition are the primary differences that make one guy catch more than the other.

Q. Okay. Have you had occasion to determine the type of gear by — by "gear" I am referring to well, the type of net, generally, used by a treaty Indian gillnet fisherman?

A. Well, yes, in general.

Q. Is it generally the same type of a gear utilized by non-treaty — the net?

A. In areas where they fish in common, it is pretty close. Again, there is exceptions. Where they fish, particularly some of the open water areas, it is fairly close.

Q. Well, by "fairly close" wouldn't you say they particularly use the same type of monofilament but multistrand filament net?

A. Yes, most of them use that.

Q. And as a general rule, the fishing, treaty fishermen, fish with the same type of net that non-treaty fishermen fish with?

A. In cases where they fish the same areas, it is pretty close.

(TR., p. 219, line 22 - p. 221, line 23)

Q. Now, who has borne most of the brunt of reduced non-treaty fishing resulting from the decision in *United States v. Washington?*

A. It would be, as a generality, obviously it is the net fishermen.

(TR., p. 258, lines 3-7)

Q. Could you describe, then, the value of a chinook salmon harvested — well, the value of a fall chinook salmon harvested in a bright condition in the area of Puget Sound versus the value of a chinook salmon in a condition in which it is generally found when harvested in the river mouths or the proximity of river mouths to which it is migrating?

A. Well, again as a generality, if there is a point where

you get maximum size and fairly bright fish or even with some coloration, it will get the largest, highest price per pound. When the fish starts degenerating to some extent, it will bring a lower price as it approaches spawning.

Q. And when does this degeneration usually — well, strike that. Is the amount of degeneration generally greater in the river mouths than it is away from the river mouths?

A. Yes, generally, but like I say, that is strictly a generalization.

(TR., p. 260, lines 7-25)

Testimony of PHILLIP R. MUNDY
Tribal Fisheries Advisor
April 6, 1978

Q. And how is your confederation or your office financed?

MR. SCHLOSSER: This is completely irrelevant.

THE MAGISTRATE: I will sustain the objection.

MR. YATES: Your Honor, if the Court will permit me, I will make an offer of proof to establish the relevancy.

THE MAGISTRATE: All right.

MR. YATES: The offer of proof is that the tribes derive little or no funding for management of their fisheries for revenue generation for their tribes through the harvest of salmon that occurs in Hood Canal. And this goes to the amount that is generated and to the method whereby it is utilized.

THE MAGISTRATE: I am not going to permit it. I don't think that that has any bearing on the issues before the Court today. It might in a general sense, but not for this hearing. So I am going to sustain the objection.

MR. YATES: All right.

Q. (By Mr. Yates) Would you describe for me, Mr.

Mundy, could you state whether or not the tribes that are members of the confederation derive any income from the harvest of salmon by the members of the tribes?

MR. SIM: I will object. Same area.

THE MAGISTRATE: Is this trying to get to the same point?

MR. YATES: This is to establish that the tribes will suffer no decrease in income as a result of any — will suffer a minimal decrease in income or benefits as a result of any loss of fishing that may occur as a result of the individual fisherman not receiving their harvest.

THE MAGISTRATE: Well, I am going to sustain the objection. I don't think that that is necessarily related to this. The economic impact is not anything, I don't think, that is within the extent of this.

MR. YATES: Is the Court going to preclude any testimony about the economic impact.

THE MAGISTRATE: As far as I am concerned, unless I can recieve some indication from counsel that it would be within the framework of the issues in this case, I am not going to permit it.

MR. YATES: Well, Your Honor, as I understand it, the underlying action in this case is a number of Indian tribes against the State of Washington, based upon their being deprived of certain fishing rights. As I understand it, there is no individual fisherman who has had an entitlement to fish determined by any decision in this Court, nor has any individual fisherman sought a determination by this Court as to his entitlement to fish.

The question that I assume is before this Court is whether the tribes, the treaty tribes themselves, the governmental unit comprising the treaty tribes, not the individual members of the tribes, are suffering any loss if they do not, if their members are unable to harvest their percentage of fish which the tribes have

had allotted to them by the Court. I assume that loss must include, unless counsel — unless the United States is completely eliminating from consideration from the injunction any financial aspect of this, I assume that the loss must include money. I assume, since the tribes are parties, the amount of revenue generated through fishing must be an issue before this Court.

THE MAGISTRATE: Well, in the overall picture, there must be some relevancy to the economic aspects of the case. But the Court has already made its ruling and the basic decision of the entitlement. So if they only get 25 percent, I assume there is some economic loss to the tribe, possibly to the individuals. I don't know. But whatever, this has already been ruled upon as far as the entitlement issue.

MR. YATES: I don't question that at all, Your Honor, but what I am talking about is what loss does the tribe suffer if they don't get their entitlement. The purpose of the injunction is to prevent their losing what they are entitled to. Now, what I want to establish is the value of that. I cannot conceive that a Court would conclude that it is equitable to drive into bankruptcy 600 commercial fishermen in order to sustain for another individual an income of five or ten thousand dollars, if that is what we are talking about. I have no idea of what we are talking about.

THE MAGISTRATE: Are you suggesting that I am to review the 50-50 split?

MR. YATES: Absolutely not. I am suggesting that we are in a proceeding to determine the equities of the issuance of a particular proposed injunction.

THE MAGISTRATE: It comes around a different direction, coming to the same question. And I think that is beyond the scope of this assignment on this order of reference. So I will sustain the objection to this line of questioning.

MR. YATES: All right. In order to establish for appeal the basis for the asking of that question, I

tender an offer of proof that the response to my question was established that the tribes derive little or no benefit as a result of the harvest of the salmon by their various individual members.

(TR., p. 306, line 25 - p. 311, line 3)

ARGUMENTS OF COUNSEL

April 5, 1978

MR. YATES: May I ask the Court to delineate exactly those rights which we have and do not have in this particular hearing at this point, since it is obviously — ordinarily, counsel has the advantage of knowing the rules under which a proceeding is going to be conducted prior to the proceeding. But as these rules are being developed during this proceeding, it makes it difficult for us to make any judgment as counsel for individuals on what will be an appropriate position for the client. So I would ask this Court at this point to delineate exactly what authority we have to participate in this hearing.

THE MAGISTRATE: As I think I indicated, you will have the right to present arguments, either pro se or in behalf of any commercial fisherman. Any commercial fisherman who is represented by counsel will be permitted, absent the objection of the United States Attorney and the tribal attorneys, to present testimony in support of their position.

MR. YATES: You indicated we can present testimony. Do we have the authority to subpoena witnesses?

THE MAGISTRATE: To subpoena persons?

MR. YATES: Yes.

THE MAGISTRATE: I would say no.

MR. YATES: Okay.

THE MAGISTRATE: As a non-party, I would no.

MR. YATES: We do not. Do we have the authority to use interrogatories, requests for admission, the other discovery devices contained in the rules?

THE MAGISTRATE: I would again, as a non-party, say no.

(TR., p. 20, line 13 - p. 21, line 17)

Testimony of MICHAEL GRAYUM,
Biologist, Northwest Indian
Fisheries Commission

August 21, 1978

Q. As part of your regular duties at the Northwest Indian Fisheries Commission, do you receive tribal fishing regulations?

A. Yes.

Q. Do you review those?

A. Yes.

Q. Do the tribal regulations contain estimates of tribal fishing power?

A. Most commonly, they do, yes.

Q. What is fishing power and how is it expressed in the regulations?

A. It is generally expressed as a number of units in a year that are anticipated to participate in the fishery, basically the ability of that fleet to catch fish, the fishing fleet.

Q. Based on your knowledge of the allocations sought by the Plaintiffs for Puget Sound Coho and Chum, do you have an opinion as to whether the tribes who have usual and accustomed fishing places in the Sound have sufficient fishing power to catch the number of Coho and Chums allocated in this order if the fish are made available to them in the usual and accustomed places?

A. I believe they do.

Q. What is that opinion based on?

A. On my knowledge of past years' fisheries, their anticipated fishing effort and the run size predictions, harvestable number prediction.

Q. If limits are not placed on the non-treaty harvest, will the number of fish caught be allocated to the tribes in this order actually be made available to the tribes?

A. No, it is not likely.

Q. If you know, does the State's harvest plan typically provide for all of the harvest of South Puget Sound Chum north of the Tacoma Narrows?

A. In the last, it has, with the exception possibly of Nisqually Chum, which is a particularly late run that comes in during December, January, and February when the non-treaty fisheries have been closed in the past.

Q. Referring to the Chum run, other than the late Nisqually run, if that harvest plan is used and restrictions aren't placed on the non-treaty harvest, would any Indian tribes be denied the opportunity to harvest Chum runs which might otherwise be available at their usual and accustomed places?

A. Yes, certainly the Squaxins would.

(TR., p. 41, line 3 - p. 42, line 22)

Testimony of MICHAEL GRAYUM,
Biologist, Northwest Indian
Fisheries Commission

July 20, 1978

Q. (By Mr. Schlosser) Mr. Grayum, when you receive tribal fisheries regulations, do these regulations typically contain an essence of tribal fishing power?

A. Very often, usually they do.

Q. Can you explain for us what fishing power is?

A. It is some estimate of the ability of the fishery to catch fish and it is usually expressed in number of units of gear in this case.

Q. Have you reviewed the pre-season predictions for the 1978 salmon runs which are found in the order proposed by the tribes?

A. Yes, are you referring to the first two tables in that order on page 2 and 3?

Q. Yes, I think that is correct.

A. Yes.

Q. Are you familiar with the treaty allocations, which are being sought by the United States and tribes in this order?

A. Yes.

Q. Do you have an opinion as to whether the tribes who have usual and accustomed places in Puget Sound have sufficient fishing power to catch the numbers of fish sought in this allocation order if the fish are made available to the tribal fisheries at usual and accustomed places?

A. Yes.

Q. Would you state that opinion?

A. Yes, I do think they do have the ability to take those numbers of fish.

Q. What do you base the opinion on?

A. On the estimate, the fishing effort that I have seen by the tribes compared to previous years and numbers of fish that they caught in previous years basically.

(TR., p. 28, line 16 - p. 29, line 23)

NOTICE OF
UNITED STATES WITHDRAWAL OF APPROVAL
OF
1975 IPSFC REGULATIONS

July 19, 1975

(Exhibit USA-96)
Hand written not typed

6:30 p.m.
July 19, 1975

W. L. Sullivan
Donald Johnson

I hereby withdraw for the government of the United States of America the approval given on April 11, 1975, to those parts of the regulations of the International Pacific Salmon Commission transmitted by letter of February 24, 1975, which allocate open fishing times among the various types of gear within United States convention waters.

/s/ _____
T. A. CLINGAN, JR.
Deputy Assistant Secretary
of State for Oceans and
Fisheries Affairs

LETTER, CHAIRMAN OF THE IPSFC to the DIRECTOR, WASHINGTON DEPARTMENT OF FISHERIES

July 22, 1975

(Exhibit F-82)

Mr. Donald W. Moos, Director
Washington State Department of Fisheries
Room 115, General Administration Building
Olympia, Washington 98504

Dear Mr. Moos:

It has come to our attention that you have issued an Order (1229) dated July 21 which allows fishing by Indians with any gear at any time United States Convention Waters in State Areas 1, 3 and 8 are open for fishing under Commission regulations, and which allows five days a week fishing for certain Indian tribes in Convention Waters in State Area 2.

The Commission is gravely concerned that this Order does not conform with the regulations of the Commission as approved by the United States Government, and considers it urgent that appropriate steps be taken immediately to implement the Commission regulations as approved.

Yours very truly,

INTERNATIONAL PACIFIC SALMON
FISHERIES COMMISSION

/s/ _____
W. R. HOURSTON
Chairman

LETTER, CHAIRMAN OF IPSFC to the SECRETARY OF STATE

July 22, 1975

(Exhibit JX-10)

July 22, 1975

The Honorable Dr. Henry Kissinger
Secretary of State
Department of State
Washington, D.C. 20520

Dear Dr. Kissinger:

The Commission has received information that an Order has been made by the Director of the Department of Fisheries of the State of Washington that does not conform with the regulations approved by the Commission and the United States Government for United States Convention Waters in 1975.

The Order provides 5 days a week fishing for Indians in State Area 2 for tribes that qualify, and also provides that Indians may fish with any gear at any time United States Convention Waters in State Areas 1, 3 and 8 are open to any fishermen under Commission regulations. The text of the Order is attached.

The Commission is gravely concerned with this action by the State of Washington Director of Fisheries and considers it urgent that the United States Government take appropriate steps to implement the Commission's regulations as approved. Your earliest possible consideration and response would be appreciated.

Yours very truly,

INTERNATIONAL PACIFIC SALMON
FISHERIES COMMISSION

/s/ _____
W. R. HOURSTON
Chairman

Encls.

cc: The Hon. Romeo LeBlanc
Governor Daniel J. Evans
Mr. Donald W. Moos
Mr. Donald R. Johnson
Dr. Thomas A. Clingan, Jr.

LETTER,
CHAIRMAN OF IPSFC
to the
SECRETARY OF STATE

July 25, 1975

(Exhibit JX-11)

July 25, 1975

The Honorable Dr. Henry Kissinger
Secretary of State
Department of State
Washington, D.C. 20520

Dear Dr. Kissinger:

Further to our letter of July 22, the Commission has since received information that the United States State Department has temporarily rescinded its approval of those parts of the Commission's regulations for United States Convention Waters that allocate times of fishing for each fishing gear.

This change in the regulations of the Commission does not have the approval of the Commission, nor has the Commission's Advisory Committee had opportunity to be heard as provided in the Understandings stipulated in the Protocol of Exchange of Ratifications of the Convention. The Commission must register the strongest possible

protest of this action by the State Department. The Minister of Fisheries for Canada, Mr. LeBlanc, is being advised of the Commission's views on this matter.

The current state of confusion concerning the Commission's regulations in United States Convention Waters must be ended quickly, by implementation of the Commission's regulations as originally approved by the United States Government by letter from Mr. Sullivan, the Acting Deputy Assistant Secretary for Oceans and Fisheries Affairs, to the Commission Chairman on April 11, 1975, copy of which is attached.

Yours very truly,

INTERNATIONAL PACIFIC SALMON
FISHERIES COMMISSION

/s/ _____
W. R. HOURSTON
Chairman

Encl.

cc: The Hon. Romeo LeBlanc
Dr. Thomas A. Clingan, Jr.

FISHERIES ADVISORY BOARD REPORT
Re: Illegal Fishing

November 17, 1976

TO: Hon. George H. Boldt

FROM: Richard H. Whitney, Chairman
Fisheries Advisory Board

SUBJECT: Fisheries Advisory Board Meeting, October 11 and 13, 1976, to determine the number of days of substantial illegal fishing activity by nontreaty fishermen under the coho order

On October 11, the meeting was convened at 10:45 A.M. in the office of the Northwest Indian Fisheries Commission. The tribal representative was Ron Charles, and the Washington Department of Fisheries representative was James Johnson. A court reporter was present. Witnesses provided their testimony under oath as to their observations on illegal fishing activities by non-treaty fishermen. Exhibits were offered. A transcript has been prepared.

On October 13, the Board met in the office of the Washington Department of Fisheries. Designated representatives again were Ron Charles, tribal representative, and James Johnson for the Department of Fisheries. Others present were John Clinebell, attorney for the Puyallup Tribe, and Leo LaClair of the Northwest Indian Fisheries Commission. Additional information was supplied by Mr. Johnson, based on observations by WDF personnel and citations issued. The Board could not agree on definitions of "substantial" and "reasonably verifiable" illegal fishing activity; therefore, the board members will be submitting separate reports. The chairman indicated at the beginning that he reserved the right to make a recommendation or provide a separate report, and I am therefore doing so.

It was agreed that the parties would use somewhat the same outline in their reports to the Court, and that these would include the following items: A list of the days

and number of boats where substantial illegal activity took place, and the source of the information. The report would also provide a definition of "substantial" and would discuss "reasonably verifiable illegal activity." The Indian representative indicated that they would be asking for a revised sharing formula on chums to invoke the 20,000 fish penalty that appears in the coho order, because there are no coho available to the non-treaty fishermen.

The Court will have the benefit of the reports provided by the two parties which ought adequately to define the issues. It is therefore probably not necessary or desirable for the chairman to supply any recommendations. Perhaps it would be useful, however, to point out that on at least one occasion (the night of October 5-6) there was a clear effort on the part of Puget Sound Gillnetters to organize and create a substantial fishery which was illegal by any standards, i.e., it took place to a considerable extent in areas closed for conservation purposes to *all* fishermen (See affidavit of R. Pachtel of the Washington Department of Fisheries and the testimony of several tribal patrol officers). In addition it was learned that the Whatcom County Prosecutor had notified WDF he does not intend to prosecute citations issued when allocation is the basis for closure to non-treaty fishermen. As a result, there has been substantial fishing in Bellingham Bay by non-treaty fishermen at times when it was open only to treaty fishermen. That fishing was illegal, according to this Court's orders.

FISHERIES ADVISORY BOARD REPORT
Re: Lake Washington Sockeye Fishery

July 18, 1977

TO: The Honorable George H. Boldt, Senior Judge
United State District Court

FROM: Chairman, Fisheries Advisory Board

SUBJECT: Report of meeting of the Fisheries Advisory Board convened July 15, 1977 to discuss Lake Washington sockeye fishery.

The meeting was convened by the Chairman of the Fisheries Advisory Board, Richard R. Whitney, at the request of the designated tribal representative, Bernice White, member of the Muckleshoot Tribal Council and Coordinator of Fisheries for the tribe. The designated representative of the State was Gordon Sandison, Director, Washington State Department of Fisheries. The meeting was convened by telephone conference call at 3:30 p.m. Also participating were Bob Adair, Muckleshoot Tribal Biologist, and James Johnson, Assistant Attorney General, State of Washington. The designated representatives asked me, as Chairman, to submit a report to the Court on the meeting.

Bernice White asked Bob Adair to provide information to the Board on the run size and harvestable number of sockeye in Lake Washington. Mr. Adair stated that he obtained his informatin from discussions with Dennis Austin of the Washington State Department of Fisheries. As of July 13, there were 327,936 sockeye counted into Lake Washington. The escapement goal is 350,000. The projected total run size was 395,821. On this basis, the Department of Fisheries has established regulations

opening a sport fishery in Lake Washington commencing Saturday, July 16.

Bernice White moved that a tribal net fishery be approved by the Board for next week. Motion failed for lack of a second. Mr. Johnson explained that recent Supreme Court decisions have raised some questions. The specific question in this situation: * * * can the State permit an Indian fishery in Lake Washington and at the same time prohibit a net fishery in Lake Washington?

It was moved by Mr. Sandison and seconded by Ms. White, and the designated representatives agreed that the matter should be brought to the attention of the Court as soon as possible.

I informed the designated representatives and the participants that based on the facts presented, I find that there is no basis for a conservation closure for sockeye in Lake Washington. There are harvestable numbers of sockeye available in Lake Washington. I recommend that a tribal fishery be authorized that would be closely regulated and the catch closely monitored on a daily basis as proposed by the Tribal Biologist.

HIGHLIGHTS OF 1976 MANAGEMENT
of
PUGET SOUND SALMON FISHERIES

State of Washington
Department of Fisheries

April 1977

Attachment B to Affidavit of Samuel G. Wright, August 5, 1977, filed with the District Court in U.S. v. Washington, No. 9213, on August 8, 1977.

INTRODUCTION

The 1976 fishing season marked the third year of Puget Sound (Figure 1) salmon fishery management under the legal requirements of the "Boldt Decision" (United States vs. Washington, Civil No. 9213). These require-

ments affect the manner in which the Department of Fisheries regulates the treaty Indian fishery as well as the non-Indian fishery. Although treaty Indian tribes have legally-specified authority over tribal fisheries, the ultimate responsibility for conservation of the salmon resource is embodied in the Department. Thus, the Department plays the leading role in establishing the technical basis for management of the runs and recommending harvest management considerations, as well as promulgating regulations for tribal fisheries.

Department regulation of treaty Indian fishing primarily occurs after tribal regulations have failed to accommodate conservation needs of the resource. It should be pointed out that adoption of a Department regulation for Indian fishing does not necessarily mean that all tribes failed to adopt proper regulations. Most marine and many freshwater fishing areas are within the usual and accustomed fishing area of more than one tribe. Improper regulations by any one tribe could result in Department regulation.

Curtis and Austin (1977) have summarized Department and tribal regulations for 1976 Indian fisheries. There were 33 such sets of regulations in 1976, most of which affected treaty Indian fishing in several areas. Additionally, the Department requested, and received, one reservation closure in 1976.

Procedures and authority for Department regulation of tribal fisheries are specified in numerous orders of United States District Court for Western Washington at Tacoma.[1] Procedural and biological justification requirements are quite extensive and, in some cases, complicated.

[1](a) Final Decision No. 1 Re: All Issues Submitted For Decision January 11, 1974, February 12, 1974; (b) Declaratory Judgment and Decree, February 12, 1974; (c) Injunction, March 22, 1974; (d) Interim Plan and Stay Order, March 22, 1974; (e) Order for Program to Implement Plan, October 8, 1974; (f) Order Directing Prompt Notice to Dr. Whitney when Fishery Problems Arise, November 20, 1974; (g) Order Establishing Fisheries Advisory Board, October 28, 1975; (h) Stipulation re: Notice of Regulations; (i) Order on Certain Questions re: Fisheries Management, April 13, 1976; (j) Order re: Revision of Fisheries Advisory Board, May 3, 1976.

This fact, along with the number of tribal fisheries, the developing nature of their fisheries and paucity of historic data, and the diversity of tribal philosophies and goals, makes regulation of these fisheries a monumental challenge. Superimpose on this the non-Indian commercial and sport fisheries with attendent problems, which have been greatly multiplied and magnified by the Boldt Decision, and one can begin to imagine the complexity of Puget Sound salmon fishery management.

The purpose of this report is to outline the highlights of sport and commercial management of Puget Sound salmon fisheries in 1976. Commercial highlights are presented by species, in general sequence of entry into Puget Sound fisheries, and area. Because of the overlap in timing of the stocks through a given area (Figure 2) and because one species will predominate closer to the river while the subsequent species is passing through approach areas, the report does not present an exact chronological sequence of events.

Details of the events reported herein lie in a variety of documents. These include 1976 Puget Sound status reports for each species, various court orders, minutes of Fisheries Advisory Board meetings, Department regulation hearing notices, justifications filed with the court for each Department regulation of Indian fisheries, Department news releases, and informal records.

SPORT FISHERY MANAGEMENT

In 1975 the Department attempted to regulate the Puget Sound sport fishery on the same basis as the commercial fishery, with numerous emergency closures and openings. Confusion and disruption of the fishery resulted, affirming the Department's prior belief that this approach was unworkable, as well as generally unnecessary for proper management.

Therefore, in 1976 the approach was taken that closures of the sport fishery would occur in areas and during times when the fishery is specific for a stock that required complete protection. Examples were extended

emergency closures to protect Lake Washington sockeye and Skagit River spring chinook. Numerous other closures were anticipated far enough in advance to be included in the sport fishing regulations.

Additionally, a 20-inch minimum size limit was adopted for chinook in Puget Sound to protect small blackmouth and ocean sport fishing restrictions affected Puget Sound stocks. In other areas, a maximum size limit was adopted to protect adult chinook and other measures were initiated.

COMMERCIAL FISHERY MANAGEMENT

General Problems

Several general problems relative to management of Indian fisheries in the Case Area continued during 1976. The most important of these are outlined in this section.

1. **Tribal representation**: There are many reports (e.g., catch report) that require agreement between State and tribal technical representatives. In most cases, no one was able to come forth as an authorized technical representative of all tribes, or even of any one tribe. Much time was spent with tribal representatives and agreements reached only to find later that some or all of the tribes denied that the tribal representative was authorized to speak for them. All previous endeavors therefore had gone for naught.
2. **On-reservation share**: In some cases, tribes have sought to have on-reservation adjustments equal to or larger than the entire returning run. This would preclude Indian and non-Indian fishing throughout the in-Sound migration route, as well as near the river mouth. In other instances, tribes did not respond to requests to provide the Department with their estimate on which to begin the process to establish this number as required by Order on Certain Questions Re: Fisheries Management. In many

instances, the basis for the estimate was not given as required by the court order. Even in those cases where no dispute occurs, considerable time is required to go through the required steps.

3. **Test fishing**: This subject continues to be a source of conflict. Tribal test fisheries have often been proposed or conducted without proper justification or notification. Many limited commercial fisheries have ben conducted under this guise. In a few instances, test fisheries have often been conducted that gave the results needed to justify opening the area but subsequent actual fishery results did not correspond.
4. **Overlapping usual and accustomed areas**: This problem, with several tribes having broad, overlapping usual and accustomed areas encompassing major migration routes for the various stocks, continued unabated. Regulations were conflicting and confusing, often allowing illegal fishing to go unenforced. In some cases, tribes managed their fisheries to take the appropriate number of fish only to have another tribe(s) open the area and harvest part of what should be escapement. Furthermore, many tribes adopted regulations for areas outside their usual and accustomed area in an apparent attempt to establish additional rights in this manner, even though this is counter to Federal Court orders. Interceptions of large numbers of salmon by a few tribes left some of the tribes but little better off than they were before the Boldt Decision. The situation is further compounded because some tribes have invited other tribes, who don't have usual and accustomed rights in a given area, to fish with them.
5. **Burden of proof to regulate an Indian fishery**: The nature of the burden of proof upon the Department to regulate an Indian fishery

allowed fisheries in many instances to continue to such a point that the necessary conservation measures come too late and escapement impacted.

6. **Improper harvest rates**: The tendency was for tribal regulations to place a harvest rate on the early portion of the run that would not allow for sufficient escapement. The Department then was forced to close the fishery during the latter part of the run. The catch thus came from the early segment of the run and the escapement from the latter. This occurred time and again in 1976 despite the fact that professional fishery managers unanimously agree that proper management dictates that the escapement be derived from all segments of the run.
7. **Improperly filed regulations**: The year was fraught with examples of tribal fishing regulations improperly filed or not filed. Many that were properly filed were so incomplete, vague, or all-inclusive as to be meaningless. For example, regulations may be filed that legalize a 3-day-per-week fishery, but the days are not specified. Furthermore, individual tribes commonly adopted regulations that conflicted with the "in common" regulations of the Point Elliott Treaty Areas. Even though there apparently was a contractual agreement that the in common regulations prevail in case of a conflict, tribal regulations would state the opposite. This caused numerous problems throughout 1976, making such regulations virtually unforceable.
8. **Fisheries for immature salmon**: Tribal regulations providing for troll and/or gill net fisheries for blackmouth proliferated during 1976. Fortunately, with the exception of the Lummi Indians in Bellingham Bay and Makah Indians in the outer Strait of Juan de Fuca, significant fisheries did not develop.

9. **Inaccurate catch statistics**: The formula for allocation of the catch provides incentive for individual fishermen, Indian and non-Indian, to misreport area of catch. Substantial errors thus exist in the report catch statistics. Indian fishermen have the further incentive to report catches taken in off-reservation areas as having come from on-reservation and this breakdown in the catch statistics is not reliable. Catches from areas completely removed from any reservation are reported as having been made on-reservation. This problem will be felt for many years to come and may be responsible for errors in future management decisions.
10. **Reservation boundaries**: Disputes exist with several tribes with respect to the exact seaward boundary of the reservation. Several tribes have claimed large marine areas as being on-reservation. Attempts to develop compromised definitions met with little success.

A variety of general problems likewise exists for non-Indian fisheries that have arisen or been accentuated since the Boldt Decision.

1. **Conflicting court orders**: Again in 1976, conflicts developed between orders of State vis a vis Federal court. For example, adherence to Federal court orders mandated a complete closure for non-Indian chinook fishing in Bellingham Bay after August 24. Whatcom County District Court, however, prevented the Department from enforcing the closure for allocation purposes. Various Superior Courts have also found that the Department cannot allocate between Indian and non-Indians. This question is presently before the State Supreme Court.
2. **Ambiguous legal matters**: Interpretation of legal questions complicated 1976 management. For example, the Department interpreted various

court orders as meaning treaty rights do not extend to non-mitigation State hatchery fish and adopted non-Indian chinook fisheries on that basis. A temporary restraining order required recision of those regulations at the last minute.

3. **Inaccurate catch statistics**: As with the Indian fishery, the allocation requirements provide an incentive for non-Indian fishermen and buyers to misreport the area of catch. This further complicates in-season management decisions.
4. **Non-acceptance of the Boldt Decision**: A whole host of problems under this general heading prevailed in 1976. Department rapport with the fishermen was at an all-time low, and it was difficult to gain cooperation. The problem does not end at the fisherman level but continues throughout all facets of the industry and the State judicial system.

PRE-SEASON ACTIVITIES

During the late winter and early spring, the Department held meetings with tribal and Federal biologists to explain the technical basis and procedures for determining escapement goals, escapement estimates, run size predictions, other technical considerations, and harvest management objectives. Constructive criticism of methods was solicited. In retrospect, the groups were so large that meaningful input was inhibited. The meetings did, however, represent an honest effort on the part of the Department to fully explain these aspects and to seek suggestions for improvement. The original intent of the meetings was to produce joint status reports outlining predictions and harvest management recommendations for each species but, partly due to the problem of identifying authorized tribal representatives and the diversity of tribal interests, this was not possible. Instead, the Department produced the reports with review by appropriate tribal technicians prior to distribution.

A basic flaw in Puget Sound salmon status reports in previous years was that harvest management considerations were not included. To cure this deficiency, the report for each of the five species outlined the time period during which the species would be available in the various areas and the relative harvest rate that should occur to accomplish management goals. As in the past, detailed breakdowns of expected returns, escapement goals, and harvestable numbers for hatchery and natural stocks were provided for each major drainage area. These reports were distributed to all tribal biologists, as well as every licensed non-Indian fisherman.

In retrospect, a major weakness of the 1976 reports was the emphasis on pre-season predicted numbers. Status reports for 1977 will de-emphasize this aspect and include detailed methods for revising the pre-season predictions by in-season catch statistics. This places another technical requirement on the staff but is a requisite for proper management. Such methods have been used in the past for management but will be refined and formalized for 1977.

Dr. Richard Whitney, the court's technical advisor, propounded to the court a series of 12 questions that were needed to clarify several salmon sharing and management aspects of the Boldt Decision. Under the direction of the Fisheries Advisory Board, tribal and Department technical representatives negotiated, during several meetings, agreed answers to most questions. The hearing in front of Judge Boldt, however, exemplified the problem of tribal authorization for technicians. Tribal attorneys protested that their tribes had authorized no one to represent them in the negotiations and therefore repudiated the agreed answers. The State's already-compromised position was further weakened in the answers ruled by the judge as embodied in: Order on Certain Questions Re: Fisheries Management (April 13, 1976).

Because of a U.S. District court order, representatives of the Department, the U.S. Fish & Wildlife Service, and the Northwest Indian Fisheries Commission met to develop a plan for management of salmon in 1976 and

beyond. A plan was developed in three parts: Part I — Basic Species Management Guidelines; Part II — Chinook and Coho Management Guidelines; and Part III — Joint 1976 Salmon Management Guidelines for Puget Sound and Coastal Areas of the State of Washington. Again, at the hearing on the matter, tribal attorneys disavowed that their tribes had authorized any representatives to speak for them, and no court order was ever issued on the matter. This was the third year that this management plan failed to be developed.

Hearings were held on several other issues related to salmon management matters during the year. These covered rules of procedure for the Fisheries Advisory Board, treaty status of intervenor tribes, Department regulations of fisheries research and fish planting activities, Department regulations of the presence of non-Indians aboard Indian commercial fishing vessels, he question of treaty entitlement to hatchery-reared salmon, and other matters.

Finally, the salmon catch reporting-management areas were completely revamped. Areas were redescribed to more accurately reflect actual management areas, thus removing the need for extensive wording in Department regulations. With the exception of two tribes, these uniform management and catch reporting areas have been adopted by the treaty tribes. The Makah Indian Tribe has subsequently adopted the uniform areas for 1977 leaving only the Puyallup Tribe with non-uniform areas.

SPRING CHINOOK

All stocks of Puget Sound spring chinook have experienced an extended period of gradual decline, with the decline becoming more rapid the last few years. Non-Indian sport and commercial fisheries have been closed in recent years to afford maximum protection, and several enhancement projects are underway to try to rehabilitate the runs.

Canadian Stocks

Areas 7 and 7A were open to commercial fishing for non-Indians during the 6-week period from May 15 through June 26. Five days per week for reef nets, purse seines, and gill nets were allowed during the duration of the season. This has historically been a low-key fishery, and effort was light in 1976. Indian regulations allowed several tribes to participate in this fishery but actual effort was minimal.

Skagit

The Skagit River was predicted to receive a return of 2,800 spring chinook in 1976, with an escapement goal of 3,000. The Skagit River and Skagit Bay were closed to sport fishing from April 15 through June 15 by emergency order.

The 1976 spring chinook status report recommended "* * * * West Beach, Skagit Bay, and the Skagit River upstream to Gilligan Creek be closed to *all* (both on- and off-reservation) spring chinook treaty Indian fishing from April 15 through June 15. From Gilligan Creek to Hamilton the closure should extend through July 15." Tribal regulations did not reflect this recommendation and on April 20, Department representatives met with the Skagit tribes, with all Point Elliott tribes present, and again requested that tribal regulations reflect the conservations needs of this stock. The tribes stated that a sport fishing closure in Saratoga Passage and West Beach was the condition under which they would discontinue fishing. Since these sport fisheries catch very few adult chinook, and fewer still Skagit spring chinook, but do provide considerable recreational opportunity, this was not an acceptable condition. An emergency order for treaty Indian fishing was adopted April 21 with the following provisions:

Area and closure period

West Beach: Effective noon, April 25, 1976 through June 15, 1976, inside 15-fathom line from Point Partridge on Whidbey Island to

Deception Island at western entrance of Deception Pass for any net gear.

Skagit Bay: Effective noon, April 25, 1976 through June 15, 1976, all waters of Skagit Bay inside of the western entrance of Deception Pass and northeasterly of a line drawn from Rocky Point on Camano Island to Polnell Point on Whidbey Island for any gear or method.

Skagit River #1: Effective noon, April 25, 1976 through June 15, 1976, upstream from the mouth (including all forks) to Gilligan Creek for any gear or method.

Skagit River #2: Effective noon, April 25, 1976 through June 30, 1976, upstream from Gilligan Creek and downstream of Hamilton for any net gear.

Skagit River #3: Effective noon, April 25, 1976 through July 1, 1976, upstream of Hamilton and downstream of "Old Faber Ferry Landing" above Concrete for any net gear.

Skagit River #4: Effective noon, April 25, 1976 and until further notice, all areas of Skagit River and tributaries above "Old Faber Ferry Landing" for any net gear.

A Fisheries Advisory Board meeting was convened at the request of the Skagit River tribes to ask for a closure of West Beach to sport fishing. The designated spokesmen failed to agree on the need, and the chairman recommended that there was no need for court action.

On June 17, the closure for all areas above Gilligan Creek was rescinded as appropriate tribal regulations had been adopted.

The emergency order closing the areas encompassed only the off-reservation fisheries. The Swinomish Tribe continued to fish on-reservation by trap and gill net.

To satisfy tribal subsistence needs, the Department made surplus spring chinook from Cowlitz Hatchery available to all three Skagit Tribes.

Bellingham Bay

The Nooksack River spring chinook run is difficult to predict because of a limited data base. Even though it was

felt no fishing should occur on this stock, the status report recommended that the harvest for the period April through June not exceed the 10-year average catch. This would at least stop any expansion of the fishery. Sport fishing for salmon was prohibited in the Nooksack River during the entire period of spring chinook presence.

Tribal regulations, however, allowed liberal fishing. The development of a blackmouth fishery in Bellingham Bay in 1976 during the period of spring chinook migration has made it difficult to assess that fishery.

Puyallup

The Puyallup River spring chinook run was predicted to be well below that needed to allow the run to perpetuate itself, and the obvious recommendation was that no fishing occur. Despite these facts, the Muckleshoot Tribe allowed a subsistence fishery on the White River and the Puyallup Tribe fished commercially and for subsistence. Escapement fell to the second lowest recorded level.

Green-Duwamish

The Green River contains only a remnant run of natural spring chinook plus an incipient hatchery run. Muckleshoot tribal regulations provided for a subsistence fishery. The catch was probably minor.

Other Areas

Minor spring chinook runs occur in several other areas of Puget Sound. Indian fisheries are not known to have occurred on any of these.

SOCKEYE

Puget Sound sockeye stocks consist of a minor run to Baker Lake on the Skagit River and a larger run to Lake Washington. The Lake Washington run has a potential to produce several hundred thousand fish but incubating eggs have been subjected to severe winter floods in recent years and survival has been poor. The major sockeye fishery in Washington waters is in the approach areas to the Fraser River.

Skagit

The Skagit (Baker River) sockeye run has proven to be difficult to accurately predict. Returning adults are trapped and enumerated at the mouth of Baker river. The total run size can be projected mid-way through the run by analyzing daily counts, and it was recommended that no fishing occur until it could be determined that a harvestable-sized run was present. An agreement to this effect was reached with the tribes. The run was not sufficient to allow harvest in 1976, and only an incidental catch occurred.

Lake Washington

The Lake Washington sockeye run was predicted to reach Lake Washington at a level of about 285,000 fish, well below the 350,000 escapement goal. This run is enumerated as it enters Lake Washington through Ballard Locks; and in early July, when half the run has entered the lake, the total run can be projected accurately. Any needed regulation changes can occur at that time.

The sport fishery was closed by emergency regulation, and the following recommendations were made for commercial net fisheries:

Areas 4B, 5, 6, and 6C: Minimum mesh restriction to protect sockeye from June 1 to June 26 (IPSFC control begins on June 27 — season not scheduled to open until week of July 17).

Area 6B: Minimum mesh restriction to protect sockeye from June 1 to July 25.

Areas 9, 9A, and 10: Minimum mesh restriction of 6½ inches from June 6 to August 1 to protect sockeye.

Area 10A: Minimum mesh restriction of 6½ inches from June 6 to August 1 to protect sockeye.

Area 10B: No fishery should occur from June 6 to August 1. A minimum mesh restriction of 6½ inches from August 1 to August 15 to protect sockeye if chinook fishery is to occur in this area.

Area 10C: No fishery should occur prior to August 1. A minimum mesh restriction of 6½ inches to protect sockeye during chinook fishery from August 1 to September 19.

Area 10D and Cedar River: No fishery for sockeye should occur from June 6 until sockeye are no longer present or have completed spawning.

Tribal regulations failed to adequately protect the run, and a slight modification of the above recommendations was embodied in an emergency order on June 10. On June 16, the minimum mesh size restriction for Areas 4B and 5 was removed as sockeye salmon were not present. Several additional modifications of the original regulations were necessary throughout the season to accommodate the needs of all salmon species.

Canadian Stocks

Fisheries in U.S. waters for Canadian stocks of sockeye salmon are primarily for those of Fraser River origin and occur almost exclusively during times and in areas subject to regulations of the International Pacific Salmon Fisheries Commission. Lack of sufficient gear and effort to take full treaty share by those tribes with fishing rights on these stocks and the failure of the Commission to provide what the tribes feel is adequate opportunity are major problems in this fishery. Department function is mainly that of adopting and enforcing Commission regulations for U.S. waters and providing biological input to regulations through the Commission.

At the beginning of the 1976 season in an attempt to accommodate treaty rights, treaty Indians were allowed (by the clause in one of the exceptions to Commission regulations, "Insofar as the foregoing regulations prescribe the type of gear to be used during times open to fishing for sockeye and pink salmon, such regulations shall be implemented to the extent permissible under the laws of the Parties.") the flexibility to fish any gear during any time the U.S. fishery was not closed under Commission regulation. Under strict interpretation of this closure, and because of gaps between the time one gear type closes and another opens, most of the extra time consisted of daylight

hours. The Indian fleet of primarily gillnetters was more desirous of receiving extra time at night.

The exception was subsequently interpreted to allow Indians to fish each week with any gear from the time the first U.S. gear began until the last U.S. gear came out. This was interpreted by the tribes and U.S. District Court as meaning 5 days per week because troll gear in Convention waters outside the Bonilla-Tatoosh Line was not restricted. The Commission countered by changing the language of the exception to consider only net fisheries east of the Bonilla-Tatoosh Line, effectively allowing Indian fishermen one extra night of gill net fishing.

One serious problem relating to reporting of Indian sockeye salmon catches arose during 1976. Between the closure of the fishery in U.S. Convention waters on August 11 and relinquishing control on September 19, tickets for approximately 106,000 sockeye turned up. If the Commission had not discovered the error when it did in mid-August, a very serious error in division of catch between U.S. and Canada could have resulted. U.S. fishing time had to be reduced when the unreported catch was discovered.

SUMMER-FALL CHINOOK

Prior to the fall chinook salmon season, the Department proposed seasons, to be discussed at a July 15 public hearing, for the non-Indian fishery based on the interpretation that there is no legal basis for special treaty rights on artificially-produced salmon runs derived from unilateral effort by the State of Washington. Indian shares therefore were calculated on the basis of 50% of natural and hatchery mitigation runs, plus appropriate reservation adjustments. This allowed non-Indian chinook fisheries in Bellingham Bay, Skagit Bay, Carr Inlet, and Budd Inlet.

Prior to adoption of these regulations, a hearing was held in U.S. District Court on the motion of tribal attorneys and a temporary restraining order was issued prohibiting calculation of Indian shares on any basis other than the total number of fish, regardless of natural or

hatchery origin. On July 15, at the previously-scheduled adoption hearing, the Department adopted the non-Indian regulations as proposed with a provision that the Skagit Bay, Carr Inlet, and Budd Inlet fisheries would not occur if the temporary restraining order was extended at a hearing scheduled for July 19. Because of prior interceptions in other non-Indian fisheries, the entire run to reach Puget Sound for these three areas was needed to satisfy the Indian share if shares were calculated on total fish regardless of origin. Following the July 19 hearing, the temporary restraining order was extended until resolution of Phase II of U.S. vs. Washington. Allocation calculations were subsequently made as directed by this order, and fisheries in the other three areas were cancelled.

In late August, non-Indian gill net fishermen filed suit in Thurston County Superior Court asking that the regulations adopted for Skagit Bay, Carr Inlet, and Budd Inlet be re-established. The motion was denied for Carr Inlet and Budd Inlet, but granted for Skagit Bay. By this time, however, Indian fishermen had already harvested the available number and the area was closed to all by Department conservation regulation.

Bellingham Bay

The Nooksack-Samish fall chinook run, primarily of hatchery origin, was predicted to be 98,400 fish with nearly 88,000 harvestable. Despite the large prediction, it was required that Area 7C be closed after August 31 to ensure sufficient escapement to Samish Hatchery to perpetuate the run at this high level.

Adopted regulations for non-Indians provided a 5-day-per-week fishery in Area 7C from July 18 through August 28 and in Area 7B from July 18 through September 11. In the middle part of August it became obvious that the run was well below the predicted level. The non-Indian fishery was terminated on August 24 for allocation purposes. A ruling from Whatcom County District Court, however, prevented the Department from effectively enforcing that closure.

On August 26, when other fisheries in Bellingham Bay were being reduced, the Swinomish Tribal Community, by emergency order, opened the Samish River to commercial fishing, thus jeopardizing escapement that had reached the river. No reason for the opening accompanied the regulation, and tribal officials could not be reached nor was there any prior contact with the Department by tribal officials. An emergency order was promulgated on August 27 to close the river.

Tribal regulations did not reflect the need for closure of Area 7C in September. Telephone contact was made with tribal leaders in late August without success. Even though the biological need for the closure was recognized, refusal to act was based on the excuse that an illegal non-Indian fishery was occurring in Bellingham Bay. Therefore, an emergency order was adopted on August 30 providing for a conservation closure of Area 7C until further notice. The closure was rescinded on October 19. Test fishing indicated a few chinook were still in the area but hatchery escapement goals had been assured by the continued closure of Samish River and Samish Flats.

Skagit

The total summer and fall chinook run to Skagit Bay was predicted to be 28,700 fish, providing for a commercial harvest of 7,800 with 700 of these estimated as an incidental catch that would be taken during the coho fishery. The status report recommended that 4,500 be harvested from the summer segment of the run and 3,300 from the fall segment.

Tribal regulations failed to provide for the indicated harvest rate on the summer run, and by mid-July it became evident that the run was being over-harvested due to the expanded fishery. Total effort in the river was 5 times that previously expended and effort in the bay more than double.

Tribal regulations continued to provide a harvest rate in excess of that dictated by all available information. On August 6, a meeting was held with Department staff, Dr. Whitney, and tribal technical representatives.

It was agreed that nothing could be done to undo the prior over-harvest and that there would be an estimated additional harvest of 340 summer chinook if the remaining 1,300 fish from the fall run were to be harvested. Tribal representatives proposed that they be allowed to manage the fishery according to the following schedule:

Week	Percent summer present	Total catch not to exceed	Summer run catch not to exceed
August 8	50%	300	100
August 15	30%	600	200
August 22	10%	400	40
August 29	—	—	—
		1,300	340

The fishery was to open only in the bay for a day at a time and terminate for the week once *either* of the above limits were reached. The number of summer runs in the catch was to be determined by analysis of coded-wire tag recoveries.

During the first week the river and bay were both opened, contrary to the agreement to fish the bay only. Despite the fact that the catch the first 2 nights approached 300 fish, both areas were open for two additional nights and catch for the week exceeded 670 chinook.

Prior to August 23, the numbers of chinook salmon that should be caught — per the August 6 agreement and a Fishery Advisory Board meeting on July 9 — had been exceeded, with an incidental catch during coho fishing of an estimated 700 fish still to come. The off-reservation fishery had been closed by tribal regulation but the reservation remained open. On August 23, the Swinomish and Upper Skagit Tribes suddenly opened the river and bay to commercial fishing by emergency regulation. The opening was prompted by an apparent illegal non-Indian fishery of minor proportions in Skagit Bay on the night of August 22 (13 fishermen, 57 chinook). The justification was that "A non-treaty fishery had been opened in Skagit Bay. Since this will increase the non-treaty allottment

(sic), it will also increase the treaty allottment (sic). The treaty fishery has been opened to harvest this amount." No such non-treaty opening occurred. As previously indicated, a Thurston County Superior Court judge had issued an order instituting non-Indian seasons originally proposed by the Department, but an emergency order by the Department closing the area for conservation purposes was immediately adopted. Additionally, the Upper Skagit Tribe had previously established a coho fishery to begin prior to September 5. Such an opening was unnecessary to properly harvest the coho run, which would not be present in the river in any abundance at that time, and would have even further impact on the chinook run. On August 24, a Department emergency order closed Skagit River and Bay to Indian commercial fishing until September 5, at which time the coho management period would begin. Operation of the trap and the on-reservation gill net fishery continued through this period.

Stillaguamish-Snohomish

The chinook status report forecast a weak natural run to the Stillaguamish-Snohomish system and recommended a fishery in Areas 8B and 8C to take a total of 4,100 chinook. This would appropriately harvest the natural runs to the two rivers and a proportion of the Tulalip Creek hatchery return. Any additional hatchery return could and should be harvested inside Tulalip Bay to avoid over-harvesting the natural run.

Instead, the tribe maintained a 5-day-per-week fishery throughout the run in a portion of Areas 8B and 8C and caught over 7,500 chinook. The burden of proof required for Department regulation of treaty Indian fishing precluded Department action. The Snohomish River escapement was well below the established goal.

Hood Canal

Hood Canal natural runs were expected to return at levels below escapement goals, but about 4,900 chinook were predicted to be in excess of needs at Hoodsport Hatchery. George Adams Hatchery run could support a

harvest of 6,000 fish with an incidental harvest of 1,400 Skokomish River natural chinook. About 1,400 Quilcene Hatchery chinook were expected to be available for harvest.

A total of about 12,300 chinook should have been harvested in lower Hood Canal and the Skokomish River. No information in-season suggested a higher harvest was appropriate. The total catch, however, was about 19,300. The George Adams Hatchery escapement goal was not reached.

Southern Puget Sound

Because Puyallup and Nisqually runs were expected to return at less than excapement goals, it was recommended that no commercial net fishing occur in Areas 6B, 9, 10, 11, 11A, and 13, plus the Puyallup and Nisqually Rivers. Harvestable numbers were expected to return to Budd Inlet, Carr Inlet, Duwamish-Green River, and Lake Washington.

By August 16, the total numbers of chinook available for harvest according to the pre-season forecast had been taken with no allowance made for the inevitable incidental catch during coho fishing. Most evidence at that time suggested runs were below predicted levels. On August 16, however, the Point Elliott treaty tribes opened Area 10 and much of Area 9. No justification was given in the order. A Department emergency order was promulgated immediately to close the areas. Due to court-imposed time considerations for closing Indian fisheries, a catch of over 4,000 chinook was taken before this fishery could be effectively stopped. This catch included fish bound for Lake Washington and Duwamish-Green River that had already been over-harvested and for Puyallup and Nisqually Rivers, where returns were less than escapement needs.

A Fisheries Advisory Board meeting was held on August 20 at the request of certain tribes to protest the closure. Following prolonged discussion and an unsuccessful attempt to force a simultaneous closure of the sport

fishery, the designated tribal representative conceded to accept the closure.

Lake Washington and Duwamish-Green

The Lake Washington predicted return was 9,400 chinook with an allowable harvest of 1,000. An allowable harvest of 5,200 chinook was predicted for the Duwamish-Green River with 1,000 expected to be taken during the subsequent coho fishery. Lake Washington and Duwamish-Green chinook harvests both greatly exceeded the appropriate numbers.

Throughout the management period in this area, considerable confusion occurred because of verbal transmittal of tribal regulations to the Department that were not followed by written records. Inaccurate catch records also added confusion to the management of this fishery. Several Department regulations were adopted for the Indian fishery to protect fall chinook in the river and estuary.

Puyallup River

A run below escapement needs was predicted for the Puyallup River and no fishery should have occurred. Puyallup Tribal regulations, however, provided for a Commencement Bay fishery. This was closed by the Department emergency order of August 18. An on-reservation chinook fishery continued, however, and a catch of about 2,800 chinook was taken commercially. Escapement was very poor. The closure remained in effect until September 5.

Nisqually River

The Nisqually run was expected to return at below-escapement needs. Nisqually Tribal regulations failed to fully accommodate these needs, and the off-reservation areas were closed until September 5 by the emergency order of August 18. Over 250 chinook were taken during the season, and escapement was very poor, as it has been for several years.

Budd Inlet and Carr Inlet

These hatchery runs returned at less than predicted levels. No escapement was required at Minter Creek Hatchery, and a continuing fishery was allowed. Tribal regulations adequately accommodated Capitol Lake escapement needs. Lack of proper mesh restrictions, however, allowed substantial blackmouth catches during the early portion of the fishery.

As in past years, this fishery was reduced by tribal regulation to allow a larger egg-take, needed as a result of over-harvest in other areas.

COHO AND EARLY CHUM SALMON

The period mid-September until late October encompasses the time most coho stocks pass through Puget Sound migration routes enroute to the spawning areas. Additionally, there are stocks of early chum salmon bound for various Hood Canal tributaries and inlets in southern Puget Sound that exhibit similar timing. In most areas these early chum stocks equal only a small fraction of the number of coho and cannot be managed separately.

On August 13, prior to the second hearing relative to the tribes' motion to preclude the State from excluding hatchery fish from treaty share calculations, the Department made notice of a public hearing to be held September 3 to adopt regulations for the non-Indian coho fishery. Specific regulations were not proposed because of the uncertainty of the hatchery fish issue. Numbers expected to be available to Indian and non-Indian fisheries under both possible resolutions of the issue were provided. On August 26, following extension of the restraining order rquiring that hatchery fish be included in Indian shares, specific proposals were made for the hearing. Fisheries were proposed for various days per week and for various durations, beginning September 12, to harvest the appropriate share in Hood Canal, southern Puget Sound, Bellingham Bay, and Port Susan-Port Gardner. A 3-day-per-week fishery was proposed for Areas 7 and 7A to harvest Canadian stocks.

On August 31, the Case Area tribes filed a motion for preliminary injunction asking the Department be enjoined from enacting any regulation which allowed a non-treaty fishery in any area of Puget Sound until treaty fishermen had harvested a number of coho equal to

1. the number of coho which would have returned to usual and accustomed treaty fishing areas during the 1976 season, but had been intercepted by non-treaty fisheries, plus
2. a number, to be determined by U.S. District Court, as an equitable adjustment to compensate treaty fishermen for their reduced opportunity to harvest sockeye salmon in the 1976 IPSFC fishery.

Following a hearing on September 3, at the same time as the Department regulation hearing, Judge Boldt enjoined the Department from permitting any non-treaty commercial fishing in Puget Sound waters (except Areas 7 and 7A where Canadian stocks predominate) prior to September 20. He also ordered that the non-treaty share should be subjected to a 20,000 fish reduction for each day of "substantial and reasonably verifiable non-treaty fishing in violation of Washington Department of Fisheries closures". Further, he approved a proposal for the Makah Tribe to fish in Puget Sound outside their usual and accustomed area at the invitation of other tribes. Finally, he ordered the Department to negotiate on-reservation catch adjustment agreements where none had been reached (Order Re: 1976 Coho Fishery).

As provided in the order from Judge Boldt, regulations adopted by the Department following the September 3 regulation hearing delayed the non-Indian coho fishery opening until Septembe 20. Despite the recommendations in the coho status re rt and the known time of entry of coho run into Puget So d waters, tribes variously adopted regulations for coho fishing seasons prior to the September 5 beginning of the coho management period. Openings as early as August 22 were adopted.

When the emergency order protecti chinook salmon expired on September 5, the tribes immediately began

fishing most areas of Puget Sound, with large catches of early chum salmon in Hood Canal and southern Puget Sound. The tribes had been asked to forego fishing during the week of September 5 as few coho would be present and this would be the only opportunity to allow escapement of early chum salmon past the major intercepetion areas. Such a delay would have also reduced the incidental catch of chinook salmon always present during the coho management period.

The 1976 coho salmon run to Puget Sound was initially predicted to provide a harvest of 702,750 fish. Harvestable numbers were expected for each management area. As soon as the run entered the Strait of Juan de Fuca, it became doubtful that it was of the magnitude suggested by the pre-season prediction. By September 17, there was strong evidence that the coho run was not as large as predicted. On that day, the non-Indian fisheries (except Areas 7 and 7A) scheduled to open on September 20 were cancelled to allow collection and analysis of all possible run size indicators. On September 21, non-Indians openings for inside waters scheduled for September 23 were cancelled. The run was calculated to be 40-50% below the pre-season forecast. Because of prior interceptions in non-Indian fisheries and the reduced run size, the entire run to reach inside waters was required to accommodate the Indian share, and no non-Indian fishing was allowed except in Areas 7 and 7A.

The further ramification of the lowered run size was that natural runs were below the number needed for escapement. Areas of Puget Sound through which these stocks migrate were closed to treaty Indian fishing on September 23 and further harvest was restricted to terminal areas where hatchery fish predominated to afford maximum protection to natural stocks. Indian fisheries on natural stocks were not closed in Skagit Bay and River in Port Susan-Port Gardner for Stillaguamish-Snohomish River stocks. The burden of proof requirements were such that these desirable closures were not made, and the tribes were left to manage their fisheries in these areas at this time.

Meetings were held with tribal representatives where on-reservation adjustment agreements had not been reached — without further success. A hearing was scheduled for U.S. District Court to resolve the matter. By the time a hearing could be held, the matter became moot for 1976 management because all non-Indian fisheries had been cancelled.

The portion of Order Re: 1976 coho fishery that specified a penalty for non-Indian illegal coho fishing generated considerable activity. Fisheries Advisory Board and other meetings were called to determine how many, if any, days of illegal fishing occurred that were "substantial and reasonably verifiable". The matter was not resolved through the Fisheries Advisory Board and was submitted to the court, but no hearing was held. The matter was not resolved. Although moot as far as 1976 coho allocation was concerned, an attempt was made later to have the penalty applied to the chum salmon allocation.

Nooksack-Samish

The Nooksack-Samish coho run, primarily of hatchery origin, was initially predicted to return at a level of about 102,000 fish, providing a commercial catch of about 96,000. Area 7B was left open for Indian fishing. Area 7C remained closed by Department regulation until October 19 when test fishing indicated that chinook salmon were no longer present. On September 9, Point Elliott tribes amended in-common regulations opening Area 7C in contradiction to Department conservation regulations. The Department regulation prevailed however.

Skagit

The Skagit River run was predicted to provide a total catch of 14,400 coho, with management keyed to obtaining the full escapement goal of the natural run. This would have been obtained by a moderate fishing rate. When the run entered Puget Sound well below the pre-season prediction, there should have been little or no fishing. Tribal regulations did not reflect this situation, however, and an intense fishery occurred. The Department tried to

persuade the tribes to moderate or eliminate the fishery in their own regulations. This failing, on October 8 a Department emergency order was issued closing the Indian fishery in the entire Skagit system except aa small portion of the Cascade River where hatchery coho could be harvested. The tribes then mirrored this regulation.

On October 26, Sauk-Suiattle Tribal regulations opened the Sauk and Cascade Rivers contrary to Department conservation regulations, but the Department regulation prevailed. The Swinomish Reservation fishery continued through most of the run.

Stillaguamish-Snohomish

The pre-season forecast was for a total return of about 144,000 hatchery and natural coho to the Stillaguamish and Snohomish Rivers. With management keyed to obtaining full escapement of natural stocks, a total of 64,000 coho was expected to be harvested, plus an additional number of hatchery returns to Tulalip Bay. The revised run size estimate suggested a low rate of harvest was appropriate with a total of only a few thousand harvestable fish. Tribal regulations did not reflect this situation, but the court's burden of proof requirements did not allow a State conservation closure. A 7-day-per-week Indian fishery began on September 13 and continued through the run. Although escapement was satisfactory in the Snohomish system, Stillaguamish River escapement was among the lowest on record.

Hood Canal

The coho return to Hood Canal was initially predicted to be 106,545 fish, with harvestable numbers available for all hatchery and natural stocks. With the revised run size estimate, the fishery was confined by Department conservation regulation to Areas 12A and 12D and the Skokomish Reservation wherein hatchery coho are relatively separated from natural coho. The fishery was allowed to continue in these areas throughout the duration of the coho run. Early chum salmon dominated the catch, however, as the strongest run observed in recent years occurred.

Southern Puget Sound

A total run of 446,000 coho was predicted to reach Area 10, providing a harvest of about 404,000 fish. With the revised run estimate, the fishery was restricted to Areas 10A, 11A, and 13A, with minor exceptions, wherein hatchery coho were available for harvest. The Squaxin Tribe was allowed to fish in parts of Area 13B to harvest a strong run of early chum salmon stocks with appropriate area and mesh regulations to protect coho.

The Puyallup Tribe adopted regulations opening the Puyallup River to coho fishing on September 1, nearly 3 weeks prior to entry of significant numbers of coho into the river. Upon Department objection, this opening was delayed to protect chinook salmon. The Muckleshoot Tribe adopted regulations opening the Duwamish River to coho fishing beginning September 1 despite the fact that chinook, which had already been over-harvested, would be the major species present at the time, and no coho catch would be foregone by delaying the opening. An emergency order of the Department delayed the opening. Several subsequent orders were adopted to adjust the closure to protect chinook milling in the Duwamish River. Similarily, several regulations were adopted to regulate the coho fishery in Lakes Washington and Sammamish.

Strait of Juan de Fuca

All tributary streams, except the Dungeness River, were closed to fishing for coho by Department conservation regulation. Indian fisheries occurred on all major streams regardless. The Lower Elwha Tribe was left to adopt regulations for the Indian harvest of Dungeness Hatchery coho. Regulations were numerous, including some that were not received by the Department until after the fact. Low flows, an intense Indian fishery, plus inaccurate catch records resulted in the desired hatchery escapement not being achieved.

Canadian Stocks

A 3-day-per-week non-Indian fishery for Canadian coho stocks was maintained for the duration of the run. Indian effort was light.

NORMAL AND LATE CHUM SALMON

The pre-season chum forecast was for a generally light run with harvestable surpluses to most major areas. To protect the only hatchery brood stock sources (Hoodsport and Quilcene Hatcheries) of chum salmon eggs that were needed to supply extensive chum salmon enhancement programs, Hood Canal and all migration routes for these stocks were scheduled for complete closure.

Because of the uncertainty of the chum salmon prediction and the excellent predictive value of a 1-day fishery in Areas 10 and 11, an October 18 non-Indian fishery was the only proposal for the regulation hearing. Subsequent regulations were planned on the basis of the result of that fishery.

Southern Puget Sound

Normal and late timing chum salmon were predicted to return to southern Puget Sound areas only slightly in excess of escapement needs, but the 1-day opening was to be the basis for management of the early portion of the run.

On October 6 a meeting of Department and treaty Indian technical personnel was held at the request of the latter group. The concensus was that pre-season predictions for the normal-timing chum salmon run in Puget Sound were very likely conservative because of the excellent showing of early-run chum in southern Puget Sound and Hood Canal, plus an assessment by Canadian fishery managers that their chum stocks were returning at levels approximating the good runs of 1972 and 1973. NWIFC personnel requested that the Department update the preseason predictions immediately to provide Indian tribes with a basis for dividing their allocation of the run. This was not done because of the failure of the early: normal run correlation in Hood Canal in both 1974 and 1975. All relevant data were provided to NWIFC personnel. An analysis based on this relationship appeared in an affidavit from a NWIFC staff member, dated October 13.

On October 14 a meeting of the Fisheries Advisory Board was held at the University of Washington by request of treaty Indian representatives. Their primary concern was obtaining a delay in the 1-day non-Indian fishery scheduled for October 18 in southern Puget Sound (Areas 10 and 11). At this point in time, the tribes were expecting an allowable harvest of over 280,000 southern Puget Sound chum salmon, per the October 13 NWIFC affidavit provided to the Department at this meeting, but were requesting a delay in the non-Indian fishery on the basis that significant numbers of coho were still present. On October 15 the Department delayed the non-Indian fishery until October 21.

On October 19, treaty Indians filed a motion in U.S. District Court for preliminary injunction asking for a 260,000 fish adjustment on chum salmon (due to the 1975 chum situation and a projected 1976 coho catch imbalance), plus an additional adjustment for 1976 illegal fishing which they apparently claimed to be 20,000 fish per day for 7 days. The total request was apparently 400,000 fish (260,000 plus 7 times 20,000, or 140,000). Some details of these requested adjustments were provided in the "Request for Determination and Motion for Preliminary Injunction" dated October 19 but Indian representatives failed to provide the full details by not submitting a required report on previous Fisheries Advisory Board meetings relative to illegal non-Indian fishing. Tribal attorneys were never able to receive a hearing on the motion. Also on this day, the conservation closure to protect coho salmon in Areas 10 and 11 was rescinded.

On October 21, the initial non-Indian fishery on chum salmon in Areas 10 and 11 was opened. Analysis of catch data showed that further harvest was justified. On this same date, tribal technical personnel submitted a proposal to the Department concerning a management plan for southern Puget Sound chum salmon. Subsequent analysis of this proposal showed that it would provide treaty Indians fishing in terminal areas with substantially more

than 50% of the main south Puget Sound chum for all run sizes up to about 180,000 fish. It also appeared that technical management costs of the proposal would be prohibitive, overall value of the fish harvested would be markedly reduced, and actual implementation was not even feasible at the present time.

On October 25, a telephone meeting of the Fisheries Advisory Board was held to debate the merits of a scheduled 1-day non-treaty fishery in Areas 10 and 11 on October 26-27. Department analysis was that the run size projected from the first day's fishing was conservative, but even this projection would provide adequate harvestable fish for additional non-treaty fishing. Tribal representatives challenged the State's authority to make allocation closures on treaty Indians. Without this ability, there would be no way to implement the Boldt Decision sharing concept. No concensus was reached, and the fishery occurred as scheduled. Results of the fishery indicated a stronger run than did the first opening.

On October 26, after analysis of the 1-day non-Indian fishery in Areas 10 and 11, it appeared that the run strength was not sufficient to allow non-Indians to overcome the large share imbalance that had accrued to Indians because of the large catch of early chums that had been taken primarily incidental to coho fishing. An emergency order therefore closed to treaty Indian fishing those areas of southern Puget Sound in which chum salmon were the target species.

On October 29, treaty Indians asked the court to stop a third day of non-treaty fishery scheduled for November 1-2 (see "Notice of Hearing" and attachments). The matter was referred to the Fisheries Advisory Board. On November 1, a meeting of the Fisheries Advisory Board in Tacoma discussed the merits of continued non-treaty fishery and other issues. Again, no concensus was reached and the fishery occurred as scheduled. Non-Indian fishermen were allowed 1 day per week for the rest of November and an extra day the last week. The Indian conservation closure was maintained in most areas into early January.

Squaxin Indians were allowed to fish in restricted areas of southern Puget Sound after the escapement goals of local streams were assured by continual monitoring of the spawning escapement in index areas.

On December 12, the coho conservation closure of the Nisqually River was rescinded, and a tribal fishery occurred on the late chum stock in this river system.

Nooksack-Samish

The pre-season chum salmon prediction for Nooksack-Samish indicated a harvestable number of 6,700 fish and a moderate harvest rate.

Three days of non-Indian fishing were allowed in mid-November, 1 day in each of 3 weeks. Instead of the necessary moderate fishing rate, however, Lummi Tribal regulations provided for a 5-day fishery in marine areas and the river. This level of fishing had resulted in over-harvest in prior years. In 1976 abnormally low stream flows slowed migration and increased efficiency of the fishery in Bellingham Bay. Tribal regulations failed to compensate, however. On November 18, it became obvious that run strength was insufficient to allow non-Indians to reach parity of catch, and Indian fisheries in Areas 7B and 7C and the Nooksack River were closed for allocation purposes. Analysis of subsequent data, including late-arriving Lummi Tribal catch data from as far back as November 3, indicated that the closure was necessary for conservation purposes and was so altered on November 22, and no further non-Indian fishing was allowed.

Lummi regulations continued to provide for a reservation fishery. The excuse was used that there was an illegal non-Indian fishery occurring and the tribe would not close as long as that continued. After a lengthy delay because Judge Boldt was out of town, a Fisheries Advisory Board meeting was held to discuss the reservation fishery. As the tribe still refused to curtail the reservation effort, a hearing was held before Judge Boldt on a motion of the Department. Following the hearing, the Judge issued a temporary restraining order closing the on-reservation

fishery until the end of December. As a result of the delay, approximately 2 weeks of fishing occurred after the Department was able to identify the need for the closure.

Skagit

The predicted chum salmon return to Skagit River anticipated a harvest of 12,000 fish at a light fishing rate. Non-Indian fishing was allowed 1 day per week for 3 weeks in late October-early November.

The Swinomish opened Area 8 on October 20 and fished despite the continuing Department conservation closure to protect the coho run. The Sauk-Suiattle Tribe on October 26 adopted regulations opening the Sauk River in opposition to a Department closure to protect coho salmon.

As with chinook and coho, tribal fishing effort continued much too heavily. On November 5, an emergency order of the Department was adopted, closing Area 8 and the Skagit River except that fishing was allowed 1 day per week in Area 8 and the Skagit River below Hamilton. On November 23, the closure was rescinded for Area 8 and the mainstem Skagit River when the tribes agreed that they would limit their chum salmon catch in all of Area 8 and the Skagit River (on- and off-reservation) to a total of 1,200 fish, including the incidental catch during the steelhead fishery. The Upper Skagit Tribe quickly opened a 48-hour fishery, despite immediate protest by the Department that the fishery should only open for 24 hours at a time. On November 24, an emergency order was issued by the Department that closed the Skagit River and Area 8. At that time, after only 1 night of the opening, it was obvious that the agreed 1,200 fish had been caught and the catch ended up nearly double that amount. The trap continued to fish on-reservation.

Stillaguamish-Snohomish

The pre-season forecast projected a catch of 16,500 Stillaguamish-Snohomish chum salmon at a moderate harvest rate. Non-Indian fishing was allowed 1 day per

week in each of 2 weeks in late November and early December.

Instead of a moderate fishing rate, however, tribal regulations provided for 7-day-per-week fishing. Rather than allow over-harvest of the first part of the run, on November 5 an emergency order of the Department reduced the fishery to 2 days per week to allow escapement from all segments of the run. Tribal regulations provided for an unrestricted fishery in the Stillaguamish River until a Department emergency order reduced the fishery to 2 days per week on November 8.

Hood Canal

Following the transition of Hood Canal areas from predominantly coho to chum salmon, all areas were closed to Indians throughout the duration of the run, except the Skokomish Reservation. The closure was adopted to allow maximum egg-take from chum runs to Hoodsport and Quilcene Hatcheries. Furthermore, the Indian chum catch by virtue of the strong early chum showing, was about 50,000 fish with only a small non-Indian catch. A limited-entry purse seine fishery with Department observers on board was held to harvest excess male coho salmon at Hoodsport and Quilcene Hatcheries. Fourteen different vessels participated on 7 days in late November.

AFFIDAVIT OF SAMUEL G. WRIGHT
Harvest Division
Washington Department of Fisheries

August 16, 1977

Filed: August 25, 1977, U.S. v. Washington,
District Court: No. 9213

I, SAMUEL G. WRIGHT, being first duly sworn on oath, depose and say:

I am supervisor of the Harvest Management Division under the Washington Department of Fisheries' overall Salmon Program. My staff and I are responsible, through proper application of basic professional fishery management techniques, for the development of detailed technical plans designed to achieve proper harvests of the state's salmon resources.

As of this date, I have completed a careful review of the following documents provided to me by treaty Indian representatives on August 8, 1977:

1977 On-Reservation Catch Projections

1977 Ceremonial and Subsistence Catch Projections

WDF Interception Rates for Net and for Ocean and Sport

1977 Boldt Share Allocation Over a Range of Run Sizes Entering Straits

Footnotes for Puget Sound Chinook Allocation Tables

Chinook — Strait of Juan de Fuca

Chinook — Nooksack-Samish

P.1

Summary

The technical analyses presented by treaty Indian representatives on August 8 would effectively preclude most non-treaty commercial net fisheries on chinook and coho salmon stocks of Puget Sound origin. The only

potentials for non-treaty fisheries would be for chinook and coho in Bellingham Bay, chinook in Skagit Bay and Hood Canal, and coho in southern Puget Sound. Even some of these could be eliminated by smaller than predicted salmon runs and/or the impact of excessive on-reservation catch adjustments. During the 3-year period, 1974-1976, non-treaty commercial net fisheries on Puget Sound-origin chinook have been limited to Bellingham and Skagit Bays, with the latter area remaining closed in 1976. The only "normal" Puget Sound coho fishery occurred in 1974 when a restrictive 4-day season was allowed. Coho fishing on Puget Sound stocks in 1975 was limited to terminal areas and the 1976 fishery was completely banned. The only viable Puget Sound chum fishery for non-treaty net fishermen occurred in 1976, with a complete closure occurring in 1974, and the 1975 season being limited to a single fishing day in southern Puget Sound.

The pattern cited above can be expected to continue during the 1977 season.

/s/ _____
SAMUEL G. WRIGHT

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AFFIDAVIT OF DAVID C. BURNS
Washington Department of Fisheries

August 19, 1977

Filed: August 25, 1977, U.S. v. Washington
District Court: No. 9213

I, DAVID C. BURNS, being first duly sworn on oath, depose and say:

I am assistant division chief, Fisheries Management Division, State of Washington, Department of Game;

As part of my duties, I supervise employees of the department who analyze steelhead harvest data;

At my direction, the following represents available harvest data for on-reservation steelhead catches;

(1) Figure 1: This shows trends in recorded harvest of steelhead by treaty Indians; on-reservation catches are depicted by white blocks. The general trend illustrated is that on-reservation catches by treaty Indians are increasing since the opinion was filed in *United States v. Washington.*

(2) Figure 2: This shows disparity in shares of steelhead between the all-citizen fishery and the treaty fishery;

(3) Figure 3: This shows two examples of the disparity of catches between the all-citizen fishery and the treaty fishery on rivers with reservations at their mouth.

/s/ _____
DAVID C. BURNS

FIGURE 1

BOLDT CASE AREA TREATY INDIAN HARVEST OF WINTER STEELHEAD

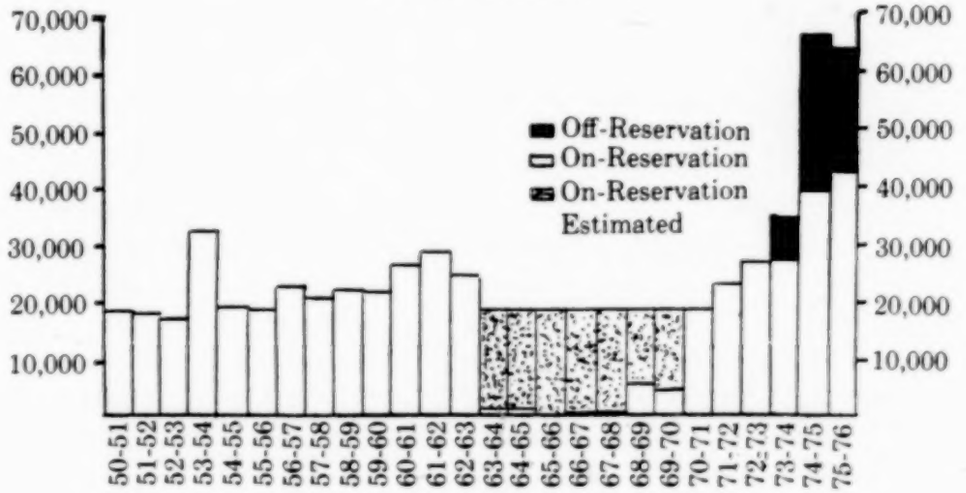


FIGURE 2

DEPARTMENT OF GAME HARVEST RECORDS

	Recorded Case Area Treaty Indian Catch	Estimate of All-Citizen Hook & Line Harvest
1969-70	4,581	50,060
1970-71	17,287	88,890
1971-72	23,441	96,207
1972-73	25,948	52,582
1973-74	34,985	51,880
1974-75	69,344	51,230
1975-76	62,926	25,878
1976-77	43,935	(Not available—probably well under 20,000)

FIGURE 3

REPORTED HARVEST OF STEELHEAD ON TWO RIVERS
WITH RESERVATIONS AT THE MOUTH

	Quillayute		Nooksack	
	Tribal	All-Citizen Hook & Line	Tribal	All-Citizen Hook & Line
1969-70	——	3,069	490	644
1970-71	7,050	6,675	——	908
1971-72	5,438	7,177	655	888
1972-73	4,711	3,101	——	875
1973-74	469	3,602	1,653	625
1974-75	10,504	4,234	4,352	622
1975-76	9,523	2,353	3,549	188
1976-77	6,917	1,764	2,725	Not available

FISHERIES ADVISORY BOARD REPORT
Re: Agreement on Salmon Management Plan

August 26, 1977

TO: Hon. George H. Boldt

FROM: Richard R. Whitney, Chairman
Fisheries Advisory Board

The development of the Salmon Management Plan through months of hard work by a Technical Working Team and a Policy Development Team appointed by the Fisheries Advisory Board has been reported in the FAB report to the court of July 14, 1977. As the court's technical advisor, I convened a meeting of the attorneys to discuss the plan on August 16 at the offices of the Ziontz, Pirtle, Morisset law firm and received suggestions for modification. Those attending were all agreed that the plan should be issued by the court in the form of an order. The tribal representatives present agreed that some suggested changes should be discussed with the Department of Fisheries. I supplied Dr. Peter Bergman and Sam Wright with written suggestions and conferred with them. Further discussions have refined agreements to the point that I can report that the Board has agreed to certain modifications in the plan as filed with the court July 14. I attach a marked copy of a revision which identifies words or portions added to the July 14 version by enclosing in brackets. Also identified with brackets are sections omitted in this version which were present in the July 14 version.

The two significant sections omitted are those identified in the July 14 version as Sections 7.4, continuing to the end of Section 8; the tribal and state proposals relating to the state's suggestion that the managers' task be simplified by supplying them with instructions to achieve a sharing formula to be met on salmon runs after they have passed the Straits of Juan de Fuca on their way into Puget Sound, said formula being

devised in such a way as to take into account an appropriate troll and sport interception rate, and whatever on-reservation ceremonial and subsistence numbers that are required by the court's allocation.

The tribes do not agree with this. The tribal representatives proposed that the court follow the procedures outlined in the 12 Questions and other rulings.

Both positions are fully explained in the July 14 version.

There are a number of motions and issues before the court; rulings on which will affect the ruling with respect to the two disputed sections described above. These must be reconciled after the court rules on Mr. Johnson's motion for modification of judgment. The U.S. Motion for a Memorandum Order and Permanent Injunction which requests an allocation formula would also affect the rulings on Sections 7 and 8, and would need to be taken into account in ruling on Sections 7 and 8.

As a summary, I wish to supply the court with the attached report which states the points now agreed upon by the Fisheries Advisory Board. I believe that this statement, which represents a lot of hard work on the part of many people, is as far as the parties can go this year in reaching agreement on the technical aspects of the Salmon Management Plan. Naturally there are many points which both sides would like to see further refined. I recommend that the court adopt these agreed upon statements and order that they be implemented and encourage the parties to continue work to refine issues that may still be in dispute.

ATTACHMENT TO REPORT OF FISHERIES ADVISORY BOARD

Meeting No. 78-51

Implementation of Salmon Management Plan

June 21, 1978

Tribal Position on Shares of Puget Sound Origin Salmon in Puget Sound During the 1977-78 Run

TREATY

Species	Mgmt. Unit	Com. Catch	Cerem. Subsis.	Hatchery Fish	Total Catch	Court Share	Adjust. needed
Sockeye	Lk Wash	35,000	1,000		36,600	28,500	-0-
	Baker R	500	-0-			500	
Summer Fall Chinook	Nooksack Samish	31,500	2,300		33,800	48,600	+14,800
	Skagit	7,500	1,000		8,500	10,400	+ 1,900
	Hood Canal	14,000	1,400		15,400	15,700	+ 300
	South Sound	30,200	600		30,800	33,600	+ 2,800
	Stilly-Snoh.	7,100	2,000		9,100	11,600	+ 2,500
Coho	Straits	6,200	2,100		8,300	7,600	- 700
	Nooksack Samish	57,200	4,000		61,200	44,000	-17,200
	Skagit	10,700	1,300		12,000	12,700	+ 700
	Stilly-Snoh.	63,100	2,200		65,300	69,400	+ 4,100
	South Sound	250,800	4,400	Adult So 32,800	d288,000	314,700	+26,700
	Hood Canal	25,000	2,600		27,600	41,600	+14,000
Chum	Straits	69	-0-		69	55	- 14
	Nooksack Samish	16,800	5,000		21,800	14,000	- 7,800
	Skagit	5,000	-0-		5,000	3,000	- 2,000
	Stiliy-Snoh.	2,200	400		2,600	2,100	- 500
	South Sound	70,300	1,200		71,500	90,300	+18,800
	Hood Canal	48,800	3,600		52,400	74,100	+21,700

NON-TREATY

Species	Mgmt. Unit	Commer. Catch	Court Share	Adjust. needed	Puget Sound Sport	Ocean Troll	Ocean Sport
Sockeye	Lk Wash		27,500	-0-	19,300		
	Baker R	500	500				
	Nooksack						
Summer	Samish	41,700	46,300	-14,800	11,600	6,800	1,000
Fall							
Chinook	Skagit	3,300	8,300	- 1,900	4,700	2,200	——
	Hood						
	Canal	5,500	13,400	- 300	5,800	2,400	——
	South						
	Sound	6,500	32,700	- 2,800	18,900	8,800	1,300
	Stilly-						
	Snoh.	4,400	8,100	- 2,500	3,700	2,500	——
Coho	Straits	1,300	9,300	+ 700	4,300	2,100	900
	Nooksack						
	Samish	16,700	66,000	+17,200	16,200	11,300	4,600
	Skagit	5,100	21,700	- 700	8,500	6,400	2,600
	Stilly-						
	Snoh.	38,300	95,800	- 4,100	28,300	23,000	10,300
	South						
	Sound	231,900	341,000	-26,700	62,600	51,900	21,300
	Hood						
	Canal	17,200	50,900	-14,000	21,700	18,300	7,600
Chum	Straits	40	55	+ 14	——		
	Nooksack						
	Samish	6,200	14,000	+ 7,800	——	——	——
	Skagit	900	3,000	+ 2,000			
	Stilly-						
	Snoh.	1,600	2,100	+ 500	——	——	——
	South						
	Sound	109,100	90,300	-18,800			
	Hood						
	Canal	95,800	74,100	-21,700	——	——	——

TOTAL

Species	Mgmt. Unit	Escape-ment	Total Run	Ct. est. Prior Intercept
Sockeye	Lk Wash	435,000	490,000	
	Baker R	1,700	2,700	
	Nooksack			
Summer	Samish	5,500	100,400	10,600
Fall				
Chinook	Skagit	9,700	28,400	1,800
	Hood			
	Canal	4,500	33,600	4,700
	South			
	Sound	32,500	98,800	
	Stilly-			
	Snoh.	9,100	28,800	
Coho	Straits	8,600	25,500	12,000
	Nooksack			
	Samish	18,600	128,600	24,000
	Skagit	36,900	71,300	13,000
	Stilly-			
	Snoh.	122,100	287,300	39,000
	South			
	Sound	75,500	731,200	100,000
	Hood			
	Canal	33,100	125,600	19,000
Chum	Straits	1,900	2,000	
	Nooksack			
	Samish	6,300	10,500	
	Skagit	38,600	44,500	
	Stilly-			
	Snoh.	6,300	10,500	
	South			
	Sound	83,000	263,600	
	Hood			
	Canal	70,300	218,500	

FOOTNOTES

Species	Footnote
Sockeye	[1]Lake, Washington: Court shares have been determined according to the allocation formula of Final Decision #1 and the Twelve Questions (*i.e.*, agreed upon run size minus escapement, minus ceremonial and subsistence, divided by 2.) because the court modified 1977 sharing for the coho and chum runs only, based on the facts and equities of those runs in the August 31, 1977 Order, p. 9.
	The adjustment needed columns reflect the fact that the non-treaty fishery was not denied opportunity. A full 50% of the harvestable run was made available but the sports fishery had insufficient power to take the non-treaty share.
	[2]Baker River: Court shares are determined according to the Final Decision #1 formula. There was no ceremonial or subsistence catch because the river was closed for conservation. Commercial catches reflect incidental harvests.
Summer-Fall Chinook	[1]Nooksack-Samish: Court shares are determined on the basis of 50% of the harvestable number after deducting ceremonial and subsistence catches, as provided in the Order, p. 14. On reservation catch was not deducted from harvestable numbers in this instance since no estimate of that catch was provided prior to the Court hearing. Sharing is calculated on the entire run, not merely the percentages taken in Puget Sound because of the serious error in the estimate of prior interceptions. Actual interceptions were 183% of the estimates given in the court order.
	[2]Skagit: Court shares are determined according to the Final Decison #1 formula, applied to the total run. Actual prior interceptions were 383% of the pre-season estimates. On reservation catch of 1,100 fish is included in the treaty commercial catch column but, as required by the Order, is excluded when calculating 50% of the off-reservation harvestable number.
	[3]Hood Canal: Hard data is used for all treaty Indian catches. Prior interceptions were 174% of the pre-season estimate, therefore shares are based on the total run. On-reservation catch of 841 fish is included in the treaty commercial catch column but is excluded in calculating the off reservation shares, per Order, p. 15.

	[4]South Puget Sound: Court shares are determined by the Final Decision #1 formula. On-reservation harvest was 275 fish. The Order, p. 16, prohibited all non-treaty fishing on this stock since it was clear that their allocation would be exceeded. The shares were not specifically set out in the Order, but the methodology used on other chinook runs has been applied.
	[5]Stillaguamish-Snohomish: Court shares are determined by the Final Decision #1 formula. On-reservation harvest was 1,500 fish.
Coho	[1]Straits: Hard data has been used for all treaty catches. Total run size is in question, as is non-treaty commercial catch, because the difference between the pre-season run size estimate (59,000) and the calculated run size (25,500), is inexplicable. Treaty court share is 45% of the total harvestable coho, with no special accounting for on-reservation, ceremonial or subsistence catch. Order p. 10.
	[2]Nooksack-Samish: Court shares are determined by 60% of total harvestable numbers for non-treaty fishermen; 40% for treaty Indians. Actual prior interceptions are 134% of the pre-season estimate.
	[3]Skagit: Court shares are determined by 63% of total harvestable number for non-treaty; 37% for treaty Indians. The treaty ceremonial and subsistence catch shown includes 1,100 fish taken in the fishery, 200 whole fish taken at a hatchery and 300 spawned-out carcasses. The spawned fish have been adjusted to fresh fish values on a 12:1 ratio as provided in the Twelve Questions Order. This is based on an average value of $10.80 per fresh fish and $.88 per spawned carcass. Total run reflects the total number of fish which escaped to the hatchery. Actual prior interceptions were 135% of the pre-season estimate.
	[4]Stillaguamish-Snohomish: Court shares based on 58% of total harvestable numbers for non-treaty fishermen; 42% for treaty Indians. Prior interceptions were 158% of the pre-season estimate. National Marine Fisheries Service data may show additional illegal non-treaty harvests in areas 9A, 8B, and 8C as well as additional catch in area 9, so the non-treaty commercial catch column may have to be adjusted upward.
	[5]South Sound: Court shares are based on 52% of total harvestable number for non-treaty; 48% for treaty Indians. Prior interceptions were 136% of the pre-season estimate. The treaty ceremonial and subsistence column shows the number of fish actually taken in the

fishery. The number of adult fish taken at hatcheries is shown, but surplus jacks are excluded since they have no adult equivalents. See the Twelve Questions Order. The hatchery fish harvest has been deducted from the escapement column to avoid counting them twice.

[14]Hood Canal: Court shares are based on 55% of the total harvestable number for non-treaty; 45% for treaty Indians. Prior interceptions were 251% of the pre-season estimate. All treaty Indian catches are hard data. The pre-season ceremonial and subsistence estimate was not achieved because the area in which many Point-No-Point fishermen generally take ceremonial and subsistence needs was closed for conservation.

[15]Straits: Treaty catches are hard data. No ceremonial or subsistence catch was taken because fisheries were closed for conservation. Non-treaty harvest is based on accepted methods of calculating catch in mixed stock areas.

[16]Skagit: Ceremonial and subsistence harvests did not take place because the river was closed for conservation. Commercial catches are essentially incidental harvests.

[17]Stillaguamish-Snohomish: Ceremonial and subsistence harvests were lower than pre-season estimates because of a conservation closure.

[18]South Sound: Ceremonial and subsistence catches took 1,200 chum from the fishery. 9,400 spawned out carcasses, donated by the Quilcene Fish Hatchery, are excluded since they are shown in the escapement of Hood Canal origin chum.

[19]Hood Canal: All treaty catches are based on hard data. Non-treaty commercial catches may need to be adjusted after discussion in the Fisheries Advisory Board based upon apparently unreported illegal non-treaty catches.

U.S. v. WASHINGTON

District Court: No. 9213

AFFIDAVIT OF A. DENNIS AUSTIN RE: ILLEGAL FISHING NIGHT OF AUGUST 28, 1977

August 29, 1977

I, A. DENNIS AUSTIN, being first duly sworn on oath, depose and say:

I am a fisheries biologist presently employed by the Washington State Department of Fisheries. My present title with the Department of Fisheries is Program Leader for the Puget Sound Indian Fisheries Management Program. As such, one of my duties is to routinely conduct aerial surveys within Puget Sound to determine the distribution of purse seine and gill net fishing effort. These aerial counts of commercial net fishing activity are used to verify effort by area as reported on fish receiving tickets and document fishing in closed waters.

On the night of August 28, 1977, I made an aerial survey of commercial net fishing activity as summarized by the following information:

COMMERCIAL NET ACTIVITY - AERIAL SURVEY

Date: August 28, 1977 Flight Time: 2130-2430 hours
Pilot: Jim Chastain Observers: Dennis Austin, Sgt. Larry Johnson

Area	Time	#G.N.	Area	Time	#G.N.
4B	N.C.		9	2210-2320	0
5	N.C.		9A	2320	0
6C	N.C.		10	2325	0
6	N.C.		11	2330-2400	0
6B	2220	0	11A	2340	1
7	N.C.		12	2205	0
7A	N.C.		12A	2200	4
6A	2220	0	12B	2155	0
7B	2245	122	12C	2150	0
7C	2245	104	12D	2145	2
8	2305	5	12E	2145	0
8A	N.C.		13A	2405	12
8B	2315	2	13B-1	2420	13
8C	2315	8	13B-2	2420	3
				Total	276

These counts indicate to me that significant non-Indian illegal fishing on the night of August 28, 1977 occurred in Areas 7B and 7C. On August 17, 1977, Areas 7B and 7C were open to treaty-Indian and non-Indian fishermen by Department of Fisheries and tribal regulations. An aerial count of these areas was made on that night. This is the latest comparable count which was made when IPSFC Convention Waters were closed to non-Indian fishermen. On that date, 240 gill nets were counted in Areas 7B and 7C. Of these, reported landings indicate 70% were non-Indian fishermen. On August 28, 1977, 226 gill nets were counted in Areas 7B and 7C, not significantly different from the August 17 count. From the data, I conclude that non-Indians are continuing to fish Areas 7B and 7C despite a closure by the Department of Fisheries to all non-Indian fishermen as directed for allocation by the Western Washington U.S. District Court.

/s/ _____
A. DENNIS AUSTIN

[PLAINTIFF'S RECITATION OF A]

U.S. v. WASHINGTON

District Court: No. 9213

SUMMARY OF EVIDENCE APPEARING OF RECORD RE: ILLEGAL FISHING AND WASHINGTON DEPARTMENT OF FISHERIES FAILURE TO LAWFULLY REGULATE

April 4, 1978

In support of their pending motion for preliminary injunctive relief the United States and the Indian tribes invite the court's attention to the documented instances of unlawful non-treaty fishing in past seasons, and the continued inability or unwillingness of the State of Washington to regulate its licensees in accordance with established federal law.

These matters are all of record in this proceeding, within the meaning of C.R. 7(b)(1), Rules of the United States District Courts for the Western District of Washington, and the plaintiffs assume there is no objection to the court's continued reliance on this evidence. This memorandum summarizes the voluminous relevant portions of the official records of *United States v. Washington*, W.D. Wash. Civ. No. 9213 since entry of Final Decision No. 1.

1. Non-treaty fishermen engaged in a substantial fishery on the 1975 coho run in direct violation of State regulations and orders of the court. (Finding of Fact #2,

Preliminary Injunction 1975 Chum Fishing, October 27, 1975, docket #1555)

2. 60,000 fish equitable adjustment was provided to treaty tribes to compensate for unauthorized non-treaty fishing, problems of enforcement and other causes which resulted in substantial denial of treaty fishing opportunity. (Preliminary Injunction 1975 Chum Fishing, October 27, 1975 pp. 1-2, docket #1555)

3. Court tried to deter illegal fishing by ruling: to compensate for losses sustained by treaty fishermen due to the continued illegal fishing by non-treaty fishermen which may occur in the 1976 coho season, the total non-treaty entitlement shall be reduced by an additional 20,000 fish (beyond the actual non-treaty harvest) for each day of substantial and reasonably verifiable non-treaty fishing in violation of Washington Department of Fisheries closures. (Order Re: 1976 Coho Fishery, pp. 3-5, September 7, 1976, docket #2436)

4. The Puget Sound Gillnetters Association publicly encouraged their members to fish in violation of State conservation and allocation closures on the 1976 coho run. The Department of Fisheries sought and obtained an injunction against the leaders of the organization preventing them from encouraging, inciting or purporting to authorize a fishery, on October 8, 1976. (Report of Fisheries Advisory Board Meetings October 11, 13, 1976 and attached letter of James Johnson, Assistant Attorney General, dated October 19, 1976, docket #2636; Statement of James Johnson, designated State representative to Fisheries Advisory Board, October 11, 1976, docket #2573)

5. Witnesses observed a total of 247 non-treaty fishing vessels violating State conservation or allocation closures in several parts of Puget Sound on four nights in September-October, 1976. "The whole fleet" of purse seiners was observed illegally fishing on September 25, 1976 in area 7, San Juan Islands. (Sworn testimony before Fisheries Advisory Board, October 11, 1976, docket #2573, pp. 26-40, 89-97, 98-118; Tribal report re: Fisheries Advisory Bd. Mtg. re: illegal non-Indians fishing, docket

#2618; Affidavit of Roland H. Hatchel, Chief of Fisheries Patrol Division; Report of Richard Whitney, Chairman Re: Fisheries Advisory Board Meeting, October 11 and 13, 1976 docket #2636)

6. Illegal non-Indian fishing activity occurred continually on the 1976 Puget Sound chum run. By October 28, 1976 the activity was at a level beyond the capability of the Department of Fisheries to terminate through normal enforcement efforts. The Governor requested enforcement assistance from the United States Coast Guard. (Request for determination Re: 1976 Chum Run p. 2, filed October 28, 1976 by Assistant Attorney General docket #2571)

7. Illegal non-treaty fishing north of area 10 (Seattle) significantly reduced the availability of chum salmon between October 17 and October 19, 1976. (Report of Fisheries Advisory Board Meeting, October 25, 1976, prepared by Sam Wright, Washington Department of Fisheries, October 27, 1976, docket #2606)

8. At least 60,000 chum salmon were taken by the illegal non-treaty fishery in area 9 (Admiralty Inlet). (Report of Fisheries Advisory Board Meeting, November 12, 1976, statements of Sam Wright docket #2636)

9. In 1976 the Department of Fisheries promulgated a policy of not making arrests for closure citations in Whatcom County where the closures were for allocation. (Testimony of Bruce Gruett, Assistant Director of Fisheries before Fisheries Advisory Board, October 11, 1976, docket #2573)

10. The Department of Fisheries considered the requirement of paragraph 14 of the Injunction [384 F.Supp. 416, which bars regulations limiting tribal harvest unless the State's regulatory scheme provides an opportunity for the tribes to take an equal share of the harvestable number], and rejected it in adopting the July 22, 1977 regulations, because the Department felt, operating under the State Supreme Court decision [*Puget Sound Gillnetters v. Moos*] that it could not comply with the federal injunction. (Testimony of Gordon Sandison, August 8, 1977, 159-160 docket #3419)

11. The Department of Fisheries did not make specific reductions in the non-Indian fishery in 1977 in order to achieve the objectives of the decision in *United States v. Washington*, based on the ruling of the Washington State Supreme Court. (Testimony of Gordon Sandison, August 8, 1977, pp. 161-162, docket #3419)

12. If the Department of Fisheries arrested a non-Indian fisherman (for violation of an allocation closure) the Department probably couldn't get a conviction in any of the State courts. (Testimony of Gordon Sandison, August 8, 1977, p. 171 docket #3419)

13. Because of the State Supreme Court ruling, when a treaty Indian fishery is allowed by Department of Fisheries regulations, a non-treaty fishery must also be allowed. (Statement of James Johnson, Assistant Attorney General, Hearing of August 8, 1977, p. 195 docket #3419)

14. There is little possibility of a State prosecutor attempting to enforce Department of Fisheries regulations required by Judge Boldt. The probability of achieving a conviction were such, a prosecution to be undertaken is even lower. (Statement of James Johnson, Assistant Attorney General, Hearing of August 26, 1977, p. 31, docket #3406)

15. Significant illegal non-Indian fishing (approximately 160 gillnet boats) occurred on the night of August 28, 1977 in areas 7B and 7C (Bellingham and Samish bays). At those places and time, fishing by non-Indians was closed for allocation as directed by the court. (Affidavit of A. Dennis Austin, Washington Department of Fisheries, dated August 29, 1977 docket #3264)

16. Local State courts have thrown out citations issued to non-treaty fishermen for violation of allocation closures in the past, and the fact that the prosecuting attorney of Whatcom County will not prosecute such cases does not come as a surprise to the Department of Fisheries. (Statement of James Johnson, Assistant Attorney General, Hearing of August 30, 1977, p. 17 docket #3420)

17. The removal of fish allocated to treaty Indians

from the jurisdiction of the State has been rejected by the State Supreme Court and cannot be implemented in Washington. The State is unable to stop non-treaty fishing under such circumstances. (Statement of James Johnson, Assistant Attorney General, Hearing of August 30, 1977, pp. 19-20 docket #3420)

18. A total of 21 non-treaty gillnet vessels were observed and documented illegally fishing by Lummi Indian patrol officers in several parts of Puget Sound between August 31 and September 14, 1977. (Affidavits of Michael Jefferson, Calvin James and David Misanes, plaintiffs' exhibits 146, 147, 149, 150, 151, and 152, Hearing of September 22, 1977 [admitted pp. 102, 105, 107-112] docket #3454)

19. Illegal fishing by non-treaty fishermen harvested over 25,000 fish from the 1977 South Puget Sound coho runs, prior to September 26, 1977. (Statement of Duane Phinney, Department of Fisheries representative to the Fisheries Advisory Board, September 26, 1977, docket #3439)

20. Between September 2 and September 27, 1977 the National Marine Fisheries Service, in conjunction with other agencies, personally served 148 copies of court orders on non-treaty fishermen engaged in illegal fishing. Approximately 140 additional illegal non-treaty vessels were observed during that period by law enforcement officers but could not be cited. (Testimony of Wayne Lewis, Hearing of September 22, 1977 pp. 19-20, docket #3454; Hearing of September 27, 1977, pp. 8-9, docket #3937)

21. The Department of Fisheries did not make arrests for violations of allocation regulations during the 1977 fishing season but directed its enforcement to protection of spawning salmon in the streams. The Fisheries Patrol was aware of on-going violations of State regulations which were issued to comply with the orders of the federal court, but believed, because of State Supreme Court decisions, that it could not issue citations to fishermen engaged in such illegal fishing. (Testimony of

Winfield S. Miller, Chief of Fisheries Patrol, Department of Fisheries, Hearing of September 22, 1977, pp. 55-58, 61, 63, and 65, docket #3454)

22. Twenty-seven non-treaty vessels were observed illegally fishing in Grays Harbor during a portion of the 1977 fishing season. Although the violations were reported to the State Fisheries Patrol the State declined to take any action. (Testimony of Fred Koontz, Quinault Tribal Officer, Hearing of October 5, 1977, docket #3901)

23. On October 7, 1977 the Department of Fisheries announced an opening of eight fishing areas to non-treaty fishermen in response to a State Supreme Court ruling, although the areas had previously been closed because the non-treaty allocations had been achieved. The Department of Fisheries indicated that the expected additional non-treaty catch in those areas would come out of the treaty share. (Report of Fisheries Advisory Board, October 7, 1977 (attached to docket #3500); Mailgram of October 9, 1977, docket #3505)

24. On October 13, 1977, the Department of Fisheries concluded that illegal non-treaty fishing had occurred in Area 7B (Samish Bay) although some of the catches had been reported as having been caught in Areas 7 and 7A. (Statement of Duane Phinney in Fisheries Advisory Board report, docket #3589)

25. Guy McMinds, representing the Quinault Indian Nation before the Fisheries Advisory Board, described observations of five non-treaty gillnet fishing boats in Grays Harbor on November 13, 1977, and that the State had provided no enforcement. All parties at the board meeting agreed that illegal fishing activity in Grays Harbor warranted federal assistance with enforcement. (Report of Fisheries Advisory Board re: illegal non-treaty fishing in Grays Harbor, docket #3814)

26. The Washington Department of Fisheries indicated that a substantial number of the 80,000 non-treaty catch of Hood Canal origin chum were taken illegally, in spite of closures for conservation and allocation purposes. Mr. Austin reported that the State had been writing

citations but the track record in the State District Court was not good, and that fishermen tend to evaluate what the citation is going to cost relative to what they make from the fish. (Report of Fisheries Advisory Board Meeting of November 14, 1977 re: closure of chum fishery in Hood Canal, docket #3945)

27. Representatives of the tribes and the State discussed the amount of illegal non-treaty harvest of Hood Canal origin chum stocks prior to November 22. The State biologist estimated the illegal harvest at 9,000 fish, while the tribal representatives estimated the illegal harvest at 45,000 to 50,000 fish. (Report of Fisheries Advisory Board Meeting of November 22, 1977 re: closure of Hood Canal chum fishery, docket #3858)

28. Since Final Decision #I, certain non-treaty fishermen have engaged in a substantial number of violations of those State fishing regulations which were issued to comply with allocation orders of this court and protect treaty fishing rights. (Finding of Fact #4 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

29. A substantial number of the violations referred to [in #28] above, did not result in criminal citations from the State of Washington or any other sanction. (Finding of Fact #5 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

30. A substantial number of the citations which were issued in reponse to the violations described [in #28] above did not result in criminal prosecution by the State of Washington or any other type of enforcement action. (Finding of Fact #6 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

31. A substantial number of the State court criminal prosecutions which did take place as a result of violations referred to [in #28] above resulted in dismissals on the ground that the Department of Fisheries has no authority to issue regulations designed to comply with orders of this court and to protect treaty fishing rights. (Finding of Fact #7 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

32. As a result of certain decisions of the Washington Supreme Court, there have been widespread, open and intentional violations of this court's orders (and of State regulations enacted to comply with those orders) by certain non-treaty fishermen during the current fishing season. (Finding of Fact #9 re: Enforcement of 1977 Fisheries Orders, September 17, 1977, docket #3412 3/4)

33. Although the Washington Department of Fisheries indicated that it intended to enact regulations which comply with this court's allocation orders, it feels that such regulations will be ineffectual because of the refusal of certain county prosecutors to prosecute citations issued for violations of those regulations and the refusal of certain State courts to convict individuals who commit those violations (Finding of Fact #10 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

34. Despite the violations referred to [in #32] above, the Department of Fisheries has not issued a single citation for violation of those State regulations during the 1977 season. (Finding of Fact #11 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

35. The State of Washington and its Department of Fisheries is, and will be unable to enforce regulations it adopts to comply with orders of this Court. (Finding of Fact #12 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

36. Because of the public nature of this litigation, implementation of the judgment depends in part on cooperation by the State of Washington and its citizens, and is vulnerable to disruption by any of a large number of individuals, whose identities cannot practicably be specified in advance. (Finding of Fact #14 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

37. The non-treaty violations of this court's orders over the past three years have caused widespread disregard of the orderly process of law, have frustrated the exercise of plaintiffs' federally protected treaty rights and

implementation of this court's orders designed to protect those rights, and have interfered with defendants' ability to comply with those orders. (Finding of Fact #15 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

38. Alternatives to direct injunctions against non-treaty fishermen, which have been used by this court to seek compliance with its orders in this case in previous years (e.g., Preliminary Injunction, 1975 Chum Fishing, October 27, 1975; Order Re: 1976 Coho Fishery, September 6, 1976) have not succeeded in deterring violations of those orders. (Finding of Fact #18 re: Enforcement of 1977 Fisheries Orders, September 17, 1977, docket #3412 3/4)

39. During 1977 several Department of Fisheries patrol officers were advised by Mr. McEachran, Whatcom Co. Prosecutor, not to bring cases to him for prosecutions which are based on violations of State regulations which allow allocation of fish between non-treaty and treaty fishermen. Consequently if a regulation appears to the patrol officers to be an allocation regulation, no citations are issued to violators of it. (Testimony of Lyle L. Neslon, Patrol Sergeant, Washington Department of Fisheries, Hearing of March 28, 1978, docket #)

Respectively submitted this 4th day of April, 1978.

Evergreen Legal Services
Native American Division

/s/ _____

THOMAS P. SCHLOSSER
Attorney for: Duwamish, Lower Elwha, Muckleshoot, Nisqually, Nooksack, Port Gamble, Samish, Sauk-Suiattle, Snoqualmie, Skokomish, Snohomish, Squaxin Island, Steilacoom, Stillaguamish, Suquamish and Upper Skagit Indian Tribes

JOHN C. MERKEL
United States Attorney
J. RONALD SIM
Assistant United States Attorney

FISHERIES ADVISORY BOARD REPORT
Meeting No. 78-56

Re: Agreement on Joint Technical Report
Re: 1978 Chinook and Coho Fishery

July 19, 1978

TO: Hon. George H. Boldt
Sr. U.S. District Judge

FROM: Richard R. Whitney, Chairman
Fisheries Advisory Board

SUBJECT: Data on 1978 Puget Sound chinook and coho salmon run sizes

'ISSUE: Receipt of joint technical report on run sizes, etc., for chinook and coho 1978.

RESULT: The Board agreed to accept and adopt the technical team's report.

On July 11, the Fisheries Advisory Board convened by separate telephone calls to Pete Berman and Dale Johnson. The board agreed to appoint a technical team to provide numerical data on the 1978 Puget Sound chinook and coho run sizes, escapement goals, ceremonial and subsistence, on-reservation, and "take-home" fish. Members appointed to the team were Duane Phinney, Lloyd Phinney, and Sam Wright for the state and Mike Grayum and Phil Roger for the tribes. The joint technical team met on July 17 and provided an agreed upon report, a copy of which is attached.

The Fisheries Advisory Board convened by telephone conference call at noon, July 19, 1978, to discuss the joint technical report. Designated representatives were Bernie Gobin for the tribes and Duane Phinney for the state. Also participating were Mike Grayum and Gary Graves for the tribe.

Mr. Gobin asked for a clarification with respect to the harvestable number, feeling it should include ceremonial

and subsistence and take-home fish. The team will provide a statement clarifying their agreed upon table.

Mr. Gobin asked what projected numbers for ceremonial and subsistence the state has from the tribes. Mr. Phinney replied that they have numbers from the following tribes: *Lower Elwha, Muckleshoot, Port Gamble, Skokomish, Squaxin I., Stillaguamish, Suquamish, Swinomish, Upper Skagit and Steilacoom.*

There was a discussion regarding methods and procedures to be used by the managers during the season. Mr. Grayum explained that the run size estimates for coho apply to the number of fish expected to reach the mouth of the Strait of Juan de Fuca. With regard to chinook, the estimate refers to the number expected at terminal areas. The total run size for chinook is therefore obtained by adding Puget Sound interception rates applied to those terminal area predictions. Prior troll and sport interception rates were applied to that number to obtain an estimate of their catch.

There was a difference of opinion on whether troll and sport interception rates should be adjusted during the season. Mr. Phinney felt there should not be a change in the coho catch after early August, as specified in the footnote to the table and in the Salmon Management Plan. Mr. Gobin felt the rate is so variable that it needs to be updated during the season along with the run-size estimates.

Mr. Gobin wanted some kind of an estimate from the state on the numbers of fish taken home by non-tribal fishermen. Mr. Phinney stated that no estimate was available. He did not feel it was possible to obtain a realistic estimate, and felt it would not affect the management anyway. A question was raised as to whether the Judge had ruled on whether non tribal take-home fish would count in the allocation.

Mr. Gobin moved and it was seconded by Mr. Phinney that the report of the technical team be adopted as corrected and clarified by saying that "ceremonial, subsistence, and take-home fish" are not included in the

harvestable number column shown in the table provided by the joint technical team.

/s/ _____
RICHARD R. WHITNEY
Chairman

July 17, 1978

JOINT TRIBAL-STATE TECHNICAL REPORT TO THE FISHERIES ADVISORY BOARD CONCERNING PUGET SOUND COHO AND CHINOOK SALMON RUN INFORMATION

The Fisheries Advisory Board asked that a Tribal-State Joint Techincial Team review data relative to 1978 Puget Sound chinook and coho salmon run sizes. The team met on July 17, 1978; attached are the joint technical reports concerning the above two subjects. Data for Puget Sound chum salmon and all Grays Harbor salmon runs will be reviewed similarly as soon as available.

/s/ _____
MICHAEL M. GRAYUM

/s/ _____
DUANE PHINNEY

1978 PUGET SOUND SUMMER FALL CHINOOK

Management Regions	Harvestable No. Available To Terminal Net Fisheries	Prior Net Interceptions[1] Treaty	Non-Treaty	Sport Interceptions[1]	Prior Troll & Harvestable Number[2]	Total Escapement Goal	Total Run Size
Straits	0	75	125	800	1,000	3,150	3,200
Nooksack-Samish	89,500	2,063	3,437	24,000	119,000	6,000	125,000
Skagit	5,350	712	1,188	4,800	12,050	14,850	26,950
Snohomish-Stilla-guamish	2,450	408	792	1,700	5,350	8,950	14,300
South Sound	24,250	3,332	6,468	27,100	61,150	31,500	91,000
Hood Canal	13,550	680	1,320	6,200	21,750	5,750	26,300

[1] Prior interceptions by the Treaty Indian troll fishery in its present nature is negligible.

[2] In some cases, this number will not equal the difference between the total run size and the escapement goal. this is due to some runs within a management region returning at levels below escapement goals while others are returning with harvestable surpluses.

These numbers do not include estimates of Tribal Ceremonial and Subsistence or non-Treaty take home catches.

Total catches are based on an annual average of the 1974-77 fisheries. The distribution between Treaty and non-Treaty fish is based on 1977 catches. More accurate estimates should be made by monitoring actual harvests during the 1978 fishery.

1978 PUGET SOUND COHO

Management Regions	Harvestable No. Available to Puget Sound Net Fisheries	Prior Troll & Sport Interceptions[1]	Total Harvestable Number[2]	Escapement Goal	Total Run Size
Straits	27,600	16,000	43,600	10,800	54,400
Nooksack-Samish	91,200	32,400	123,600	8,000	131,600
Skagit	22,300	8,000	30,300	48,000	78,300
Snohomish-Stillaguamish	101,700	40,700	142,400	75,200	217,600
South Sound	359,200	93,400	452,600	49,000	501,600
Hood Canal	56,100	33,100	89,200	22,500	111,700

[1] Subject to change depending on a review of troll effort in the fisheries during late July and early August. Prior interception by the Treaty Indian troll fishery in its present nature is negligable.

[2] These numbers do not include estimates of Tribal Ceremonial and Subsistence or non-Treaty take home catches.

FISHERIES ADVISORY BOARD REPORT
Meeting No. 78-77

Re: Puget Sound Non-Treaty Coho Fishery

September 21, 1978

TO: Hon. George H. Boldt
Sr. U.S. District Judge

FROM: Richard R. Whitney, Chairman
Fishieries Advisory Board

SUBJECT: Puget Sound non-treaty coho fishery

ISSUE: Department of Fisheries proposed additional non-treaty fishing time in Puget Sound

RESULT: The Board agreed upon one day of fishing in Areas 6B, 9, 10, and 11, commencing Sunday night, September 24, for gillnets, and Monday during the day for purse seines. Area 7B opened for a total of four days, Sunday, Monday, Tuesday and Wednesday nights to gillnets; and to seines Monday, Tuesday, Wednesday and Thursday, during the day. Areas 7 and 7A for 3 days, Sunday through Tuesday night for gillnets; Monday through Wednesday, days for purse seines. The Board agreed to reconvene Thursday, Sept. 28, by telephone to consider future coho fisheries.

As agreed upon at the September 7 meeting, the Fisheries Advisory Board convened Thursday, September 21, at 2:00 p.m., at the Sea-Tac Hyatt House. Designated representatives were Mike Peters for the Tribes and Duane Phinney for the State. Also participating were Paul Sekulich for the State, Randy Hatch, Mike Grayum, Linda Jones, Cliff Bengston, Mike Turnipseed, Jack Rensel, Phil Mundy, and Terry Martin for the Tribes.

Mr. Phinney provided the following information. For Nooksack-Samish coho, the non-treaty fishery is expected to take about 950 total coho for the three days this week.

The remaining allocations are 49,100 for the treaty allocation; 19,500 for the non-treaty. For the Skagit there is no proposed non-treaty fishery. For the Stillaguamish-Snohomish the forecast was 176,900; the run size update indicates 173,300. The remaining catch allocations are 47,800 for treaty, 13,800 for non-treaty. In South Sound the forecast was 408,200; the update is 486,600. The remaining allocations are 244,100 for treaty, 67,900 for non-treaty. In Hood Canal the original forecast was 78,600; the update is 85,300. The remaining treaty allocation is 47,000; the non-treaty is 6,800. He estimated that the catch in 7B next week would be 1000 to 1200 coho per day, where this week the catch was about 300 per day. In Areas 6B and 9, the estimate is that they would take 25,000. In Areas 10 and 11, the non-treaty fishery would take 24,000. The estimated distribution of the stocks in the catch would be 6,000, Stillaguamish-Snohomish; 16,000 South Sound; and 3,000 Hood Canal in Areas 6B and 9 fisheries. In Areas 10 and 11, South Sound stocks would be affected, and the estimated catch would be 24,000 there. In Area 7B, Mr. Phinney stated he felt that 5 days might be justified, but would propose 4 at this time because the fourth day would be the only area open at that time, so the state would propose to see how much effort would develop on that fourth day this week and go to 5 next week if it appears the effort remains within a reasonable level. For the following week, according to the expected catches, there might be a few thousand fish remaining in the non-treaty allocation for Hood Canal, Stillaguamish-Snohomish, and South Sound, but he is not prepared to make a specific proposal and suggested that the board reconvene next Thursday to discuss the latest catch information and the proposed fishery for the following week.

Mr. Peters asked the tribal biologists if they saw any problems with the proposal. Mr. Bengston indicated he saw no problem; Mr. Mundy said he saw no problem. Mr. Bengston indicated he had talked to Paul Hage, Nooksack tribal biologist, who had no problem with a 3-day

non-treaty fishery in Bellingham Bay. He had not discussed 4 days, which was the state's proposal.

Mr. Phinney presented the state's proposal as a formal motion. It was seconded by Mr. Peters. Mr. Peters then raised the question of the appropriateness of a state conservation closure in 13B, which was affecting a proposed Squaxin tribal fishery at a time when stocks of fish are being taken in the Area 10 and 11 fisheries being carried forth by the state and other tribes. Jack Rensel, tribal biologist, was asked to report. He provided a specific proposal on a test fishery and on an evaluation fishery. The tribe has proposed a 3-day fishery commencing Saturday night. His projection is that it would take 60 fish per night for a total of 180 fish per week. He presented a schedule of test fisheries to evaluate timing of chum runs into specific areas in the Squaxin usual and accustomed area.

The Board, at the recommendation of the chairman, continued the subject and agreed to reconvene by telephone conference call at 8:00 a.m., September 23, and discuss the matter further. The state wished to apply their run size updates to stocks of fish in South Sound and determine whether the conservation closure could be removed. Mr. Peters and Mr. Phinney reported to me on September 22 that the issue had been resolved. The state was rescinding the conservation closure and the tribe was proceeding with strictly limited fishery.

/s/ _____
RICHARD R. WHITNEY
Chairman

FISHERIES ADVISORY BOARD REPORT
Meeting No. 78-83

Re: Makah Fisheries for Chum Salmon

October 9, 1978

TO: Hon. George H. Boldt
Sr. U.S. District Judge

FROM: Richard R. Whitney, Chairman
Fisheries Advisory Board

SUBJECT: Makah Fisheries for chum salmon

ISSUE: The Makah Tribe requested that the Department of Fisheries rescind their conservation closure or otherwise permit tribal fisheries in Areas 4B and 5.

RESULT: The Fisheries Advisory Board was unable to reach agreement. The designated representatives asked me to report their positions to the court. The tribe invoked Paragraph 6 on page 13 of the Memorandum Order and preliminary injunction re salmon allocations for 1978 and subsequent seasons which says the Chairman of the Fisheries Advisory Board shall make a recommendation in such issues. I recommended that the conservation closure remain in effect for non-treaty fisheries, because no plan had been offered which showed a non-treaty fishery could be permitted without impacting stocks in need of protection. I recommended that the treaty fishery be permitted, because the effect on stocks needing protection is negligible, amounting to less than 1/10 of 1% of the total run of the stock needing protection.

The meeting convened at 2:30 p.m., Monday, October 9, at the office of the Northwest Indian Fisheries Commission in Olympia. Designated representatives were

Dale Johnson for the Makah Tribe and Paul Sekulich for the State. Also participating were Al Hartt and Jeff Halloway for the Makah Tribe, Mike Grayum, NWIFC, Loren Stern and Morris Barker for the State.

Mr. Sekulich commenced with an explanation of the conservation closures adopted last week by the state. The harvestable numbers of a number of natural stocks of coho in Puget Sound have been taken. The remaining harvestable are from hatchery stocks which will be harvested in terminal areas. All mixed stock areas are closed to protect natural coho. In the Strait we are approaching the chum management period. North Sound stocks of chum are predicted to have no harvestable numbers. Run size updates in season will probably not change those numbers, as they will South Sound and Hood Canal. Mr. Johnson asked what percentage of the total run of coho and chum are in need of protection. Mr. Sekulich stated that with coho less than 10% are viable natural stocks needing protection, and with chum about 15% (110,000 out of 820,000) need protection. Four out of six management regions in Puget Sound have runs of chum salmon that are not returning in harvestable numbers.

Mr. Johnson stated that in the Makah catch only 20% of the chums consist of Puget Sound stocks. The remainder are Canadian fish. If you take 15% of the 20%, then only 3% of the Makah catch would consist of stocks needing protection. He called on Al Hartt, who presented a written report and proposal for the Makahs (A copy is attached to the court's report, and is available on request from the Chairman). He stated that he believes the coho have pretty well passed the area, and that a tribal fishery would be a chum fishery. He estimated, based on past catch data and expected participation in the fishery, that the Makah catch would amount to 2,000 chum salmon, of which 3% or 60 fish would be from stocks in need of protection.

Mr. Sekulich responded that the State is concerned about their ability to enforce conservation closures in inside areas if tribal fisheries are permitted outside. The

state courts have, in the past, dismissed arrests based on conservation closures in Area 6C, for example, when Areas 4B and 5 were not closed for conservation. Despite the small percentages projected for the tribal catch, the State is managing for conservation to preserve certain stocks. Mr. Hartt inquired abut the fisheries proceeding in Areas 7 and 7A. Mr. Sekulich responded that it is true there are similar percentages of fish in 7 and 7A, as in 4B and 5, namely, stocks are principally Canadian, but in Areas 7 and 7A the distinction is that this is the last chance for U.S. fishermen to take those Canadian fish. If they waited until the fish separated out in the terminal areas, there would be no opportunity for U.S. fishermen.

Mr. Hartt stated that, in his view, the Makahs are in the same situation in Areas 4B and 5. Mr. Sekulich provided information on the breakdown of the expected catches in the Strait of Juan de Fuca, namely that 20% of the Strait chum would be of Puget Sound origin, as had been indicated; in Area 7, 15% would be chum of Puget Sound origin, and in 7A, 5% would be chum of Puget Sound origin. Mr. Johnson pointed out that this represents a lot more fish, even though the percentage is small. Mr. Sekulich said that to defer fishing in 7 and 7A would be giving up the harvest of a substantial number of Canadian fish in order to protect a small number of Puget Sound fish taken there.

Mr. Grayum provided information on 1976 catches in 7 and 7A. There were 245,000 chum taken in 7 and 7A by the non-treaty fishery in that area, and 30,000 by the treaty fishery. 11% 89%.

There was discussion of a number of alternatives that might be available to the Makahs. The state representative inquired whether the tribe would be able to participate in an invitational fishery in Puget Sound, after the fish had separated in the terminal areas. I inquired whether the tribe would be proposing as an alternative a closure of the chum fisheries in areas 7 and 7A. Mr. Johnson responded that invitational fisheries had not worked out in the past, for a number of reasons, and the

tribes had generally agreed and decided not to get involved in invitational fisheries in the future. The management is simplified without them, and the tribes are interested at this stage in developing their own local fisheries. He stated that the tribe would not be asking for a closure of 7 and 7A, because they felt the idea there was parallel to their own situation. I attempted to explore some alternatives that might provide some state as well as federal enforcement, but Mr. Sekulich was unable to agree because he felt that any tribal fishing in 4B and 5 would undermine their conservation closures, and undermine their enforcement in inside areas. He felt that the conservation closures and enforcement too important to jeopardize.

Mr. Johnson formally moved that Areas 4B and 5 be open to the treaty fishery 7 days a week. Mr. Sekulich was unable to second the motion, because there is a conservation closure in effect, and further he felt it inappropriate to lift a closure of this kind for a special group of treaty fishermen, when other treaty fishermen would be able to harvest available surpluses after the fish had got inside Puget Sound.

The parties were unable to reach agreement and asked me to report the differences to the court. The Makah Tribe called my attention to the wording in the Memorandum Order and Preliminary Injunction re salmon allocation in 1978 and subsequent seasons, para. 6, page 13, which says:

"In the event of disagreements in the Fisheries Advisory Board over whether the allocations have been reached, or whether fisheries will impact spawning escapements, the court's technical advisor shall recommend to the court whether harvest should be continued."

My recommendations are as follows.

First, I believe the issue can be identified as the problem of defining *negligible*. There is a question whether the tribal catch of stocks in need of protection is negligible. Apparently the Department of Fisheries is willing to open the fishery in areas where they feel the

impact on stocks needing protection is negligible. But at the moment there is no set of ground rules for "negligible." In this specific situation, for example, the tribes and the state have agreed that the catch of chum in the sport fishery is negligible, and therefore is counted as zero. In practice there are some chum taken by the sport fishery, but the number is negligible. I believe the state needs to provide some ground rules as a basis for decisions in such situations in order to avoid confusion, disputes, and avoid the need for the court's technical advisor to get involved in defining or reviewing conservation closures.

A fishery in a mixed stock area where there is one or more stocks needing protection must, in my view, meet three requirements:

1. The stocks needing protection must make up a small percentage of the catch.

2. The total numbers of fish caught from the stock needing protection must be small, and

3. That small number must represent a small percentage of the total number of fish in the run needing protection.

While the court waits for a definition of broader application, I think it appropriate under the present circumstances to make some recommendations and invite a response by the parties.

I think it is clear that the proposed Makah chum fishery in Areas 4B and 5 will satisfy the 3 requirements listed above in the following way:

1. The incidental catch of stocks needing protection will be 3% of the total Makah catch. I believe 5% or less would satisfy the requirement.

2. The total number of fish in the catch from stocks needing protection will be 60. I feel that anything less than 100 would certainly fall within the definition of small.

3. The catch of 60 fish will represent 0.055 percent of the total number of fish in the stocks needing protection. I feel that anything less than 0.1% would certainly be low enough.

The state was correct in instituting conservation

closures in all mixed stock areas where coho salmon are present and where chum salmon from North Puget Sound stocks (except Canadian) will be present. Based on the presentation made by the state representatives to the Board, it is clear that the state does not intend to open a limited entry fishery or other fishery that would otherwise limit the catch in a way to meet the three requirements. Any normal non-treaty fishery in Areas 4B and 5 and others listed by the state in FAB report 78-82 could not be permitted under the requirements for conservation because of the large size of the fleet, and the large catch that would be expected in those areas.

I, therefore, recommend that the conservation closures adopted by the State of Washington Department of Fisheries remain in effect, as to the non-treaty fishery. The hotline should continue to announce these conservation closures.

Because the Makah Tribe proposes a fishery which will meet all three requirements, I believe there is not a justification for a conservation closure of the tribal fishery in areas 4B and 5, and I therefore recommend that the treaty tribes chum fishery be permitted to proceed to take no more than 2,000 chum salmon in total form Areas 4B and 5. I recommend the conservation closure not be applied to the tribal fishery, because their proposal has demonstrated that conservation needs will be met. Similarly, the conservation closures do not apply to the non-treaty sport fisheries whose catch of chums is negligible, as the parties have agreed.

FISHERIES ADVISORY BOARD REPORT

Meeting No. 78-89

Re: Determination of the Appropriate Starting Date of Chum Fishery

October 17, 1978

TO: Hon. George H. Boldt
Sr. U.S. District Judge

FROM: Richard R. Whitney, Chairman
Fisheries Advisory Board

SUBJECT: Opening date for chum salmon fishery in Puget Sound

ISSUE: Determination of the appropriate starting date for the chum fishery.

RESULT: The board agreed that the first fishery for chum salmon would be in Areas 10, 11, and 12, on Thursday, commencing during the day for seines and during the night for gill nets. In addition, the board agreed to a gillnet only fishery in Area 8 for Thursday night.

The Fisheries Advisory Board convened Tuesday, October 17, 1:30 p.m., at the office of the Northwest Indian Fisheries Commission in Olympia. Designated representatives were Sam Wright for the state and Mike Turnipseed for the tribes. Also participating were: George Kalama, Randy Hatch, Nick Lampsakis, Terry Martin, Paul Svoboda, Robert Pillar, Dave Gibler, Duane Phinney, Paul Sekulich, and Gary Graves.

The meeting was requested by the state to propose the schedule for chum salmon fishing. Mr. Wright commenced by saying that according to the proposed chum management plan, which had been provided by the state and commented on by the tribes, there needs to be a fishery in the third and fourth weeks to provide an update on the run size for chum salmon. Mr. Wright proposed

that there be the first of two 1-day evaluation fisheries in Areas 10 and 11, to take place on Thursday, October 19. According to the best estimates provided in the past, one fishing day should be somewhere around the 20th and the other around the 25th. In Area 12 there are surplus fish returning to Hood Canal, and it is somewhat difficult to predict the total effort, but in the past it has not been much. The state has also worked out an agreement with the Skagit River Cooperative for an evaluation fishery in Area 8, which ought to take place at the same time.

Mr. Turnipseed asked how many coho would be taken in the chum fishery. Mr. Sekulich estimated 1,000 to 2,000. Mr. Turnipseed asked what percentage of the total catch would be represented, and Mr. Sekulich said probably 10% of the catch would be coho. I asked if there are coho remaining in the non-treaty allocation that have been reserved as incidental catch in the chum fishery. Mr. Wright responded that the state's original plan had reserved coho to be taken as incidental catch in the chum fishery, but that downward revisions of the coho run size in the updates had eliminated that buffer, the effect of which would be that the non-treaty catch would be eating into tribal allocation to some small extent. On the other hand, in other areas of Puget Sound the balance of catches had gone the other way. The state feels they have done the best they could under the circumstances, faced with the run size estimates that declined through the season beyond their expectations and ability to plan fisheries. Mr. Turnipseed expressed concern about coho stocks that are in need of protection, and related the situation to the protection of chinook at times when the coho were abundant and the conservation closures that were put into effect for chinook. Mr. Wright responded that the state is using the same standards in both situations. The management plans establish management periods for the runs of chinook, coho, and chum, and it is inevitable that there will be some overlap. The tribes in south Sound did open for coho when some chinook would be taken. The conservation closures were removed, although some

chinook would be taken incidentally in the coho fisheries. Mr. Sekulich provided the following numbers as the latest update for the coho run size: total run to the terminal area, 368,900; escapement goal, 49,000, leaving 319,000 harvestable. The catch to date is roughly 250,000, of which 113,000 are non-treaty (75,000 taken in South Sound) and 116,000 treaty catch in the Sound. The harvestable surpluses remaining are at the hatcheries.

Mr. Turnipseed called on Gary Graves, who inquired whether information from the Canadians suggests anything with respect to relative strength of the chum runs. Mr. Wright responded that Canadian catches are a little above predictions, and it looks good at this time, although the run may be early which affects the prediction. Mr. Graves inquired whether a threshold number would be employed, as was done last year; i.e., the catch on day one would have to be above a certain number before any additional fishery would be proposed. Mr. Wright said yes, they would use the same number as last year, as it would make no sense to proceed with the second day of fishing if the number on the first day makes it clear that the run is in trouble, and escapement goals would not be met.

In two days of fishing, the non-treaty fishery would probably take about ⅓ of their share. Mr. Graves asked if the state would be requesting their share of the late Nisqually run chums sometime after the second day. Mr. Wright said that they would prefer to take the non-treaty share during the normal run, although it would be possible to patch together a limited entry purse seine fishery in the Nisqually later on. This would be a subject that would be discussed at future Advisory Board meetings. He realizes that some agreement among the tribes would have to be reached if the non-treaty share is taken early.

Mr. Turnipseed called on Nick Lampsakis, who inquired what catch is expected in Area 12. Mr. Sekulich said that 1977 data are the only basis, and the catch there was 7,600 fish on a given day. The hatchery run this year is predicted to be high, so it could be slightly higher. At this time they are planning 7,600 fish in a 1-day fishery. Mr.

Lampsakis asked that if the chums are early, as indicated by results of the first fishery, would the state be willing to fish two days in the second week in order to take equal portions from different segments of the run. Mr. Wright responded that, yes, the state would be willing to look at that. They want to keep the non-treaty fishery up at the end of the Canal, in Area 12, and stay away from the river in the south end.

There was a brief recess while tribal representatives caucused. Mr. Turnipseed then called on Gary Graves who stated that the tribal representatives have no problem in Areas 10 or 12, but have certain concerns in Area 11. He wondered if the fishery in Area 11 could be postponed because of concern about high incidental catches of coho. Mr. Wright responded that the management plans have gone according to schedule, and Area 13 is designated now as a primary chum management area, and we couldn't very well backtrack to encompass Area 11 where the chums went through earlier and designate it as a coho area. There was a question about the timing of the coho runs. Mr. Sekulich said in Area 10 they were about 5 days early, and in Area 12 approximately 10 days early. Mr. Turnipseed proposed that no purse seines be permitted in Area 11. Mr. Wright responded that it would concentrate purse seines too much in other areas. They are already keeping purse seines out of the Skagit.

Mr. Graves asked if there were not some coho stocks in 10 and 11 that are no longer in harvestable numbers. Mr. Wright said yes, but the state and tribes have agreed on the management periods for chum and can't worry at this time about small incidental catches. If that were so, we would never fish. Mr. Turnipseed again asked for a proposal. Mr. Wright requested in the form of a motion that Areas 10, 11, and 12 be open Thursday, October 19, during the day for purse seines, 5 a.m. to 9 p.m., and at night for gill nets, 5 p.m. to 9 a.m.; and opening Thursday night for gillnets only in Area 8, with the understanding that the board would convene again Monday afternoon, October 23, 1:30 p.m., at the Sea-Tac Hyatt House to

discuss the results and any further fisheries. Mr. Turnipseed seconded the motion. The board instructed me as chairman to report that agreement had been reached.

The board was reconvened at 2:30, at the request of George Kalama, who asked for a discussion of the situation at the Minter Creek Hatchery. He feels that jack salmon taken there should not count in the shares. The tribes have talked to Ralph Rideout. Mr. Wright agreed that certain jacks taken in the fishery should not count in the allocation, and that the Department is only looking for a clean break in the size of fish in order to distinguish between jacks and adults. He is considering a 14-inch break-off point at this time, but wishes to have additional time to discuss this with the hatchery managers to see if this standard could be applied generally. He will get back to the tribes in the near future; next Monday at the latest. In the meantime, the tribes should keep track of the lengths of their fish so they can account for the jacks which appropriately should not be counted in the allocation.

The meeting adjourned at 2:45.

/s/ _____
RICHARD R. WHITNEY
Chairman

REPORT ON THE SNOQUALMIE TRIBE
by
Dr. Barbara Lane
(Exhibit USA-104)

(8) It is clear that the Snoqualmie regarded themselves as a continuing tribal organization. The Snoqualmie treaty signers and their followers who did not receive the land they had asked to have reserved in their own territory and who did not receive allotments on the reservations continued to press for the lands that they understood were due them under the terms of the treaty.

Pat Kanim, John Taylor (who had acted as the interpreter at the Point Elliott treaty) and other leaders met with representatives of the federal government in order to press their claims. They were unsuccessful and their decendants continued to assert tribal claims.

Eventually, the Snoqualmie Tribe along with many other tribes in western Washington joined in a suit against the government, *Duwamish et al v. the United States.* In connection with that case a large number of depositions were taken from Indian people. The depositions from Snoqualmie people were taken at Carnation, Washington, February 27, 1927. The Indian deponents were questioned by claimant's counsel, Arthur E. Griffin, and defendant's counsel, George T. Stormont.

Among the Snoqualimie deponents were Watson Martin, a grandson of old chief Sonowa, and Jerry Kanim, a nephew of chief Pat Kanim. Jerry Kanim testified as chief of the Snoqualmie Tribe.

The following excerpts are taken from Jerry Kanim's testimony.

Question. *Are you the chief of the tribe, Jerry?*
Answer. *Yes.*
Question. *What relation are you to Pat Kanim, the chief at the time the treaty was made?*
Answer. *He was my uncle.*
Question. *Do you know whether or not many of the Snoqualmie Indians got allotments of land?*
Answer. *No. Very few.*
Question. *Did you ever get an allotment?*
Answer. *No.*
Question. *Did Pat Kanim or your father get allotments?*
Answer. *No.*
Question. *Any of your children get allotments?*
Answer. *No.*

* * * *

Jerry Kanim was cross-examined by the government attorney with respect to the nature of Snoqualmie tribal government.

Question. *How did you become chief of the Snoqualmies?*
Answer. *I inherited the right.*
Question. *Do the Snoqualmies still maintain tribal relations and tribal life?*
Answer. *Yes.*
Question. *As chief, have you any authority over the other members of your tribe?*
Answer. *Yes.*
Question. *Isn't it a fact that the title of chief is more or less honorary now than actual?*
Answer. *The former chiefs were the head of the tribe, and of course at the present it is a little different than it used to be in the early days.*

Question. *In what manner did you receive recognition from the President of the United States as chief?*

Answer. *He says the certificate that I received from the President I was recognized as a member of this tribe, and the tribe suggested that I should have the right to hold that certificate that was issued of greetings from the President.*

Mr. Stormont. *That is all.*

Redirect examination by Mr. Griffin:

Question. *Did the President recognize the Snoqualmie Tribe of Indians as a tribe?*

Answer. *Yes.*

Question. *How long as the Snoqualmie Tribe of Indians been a member of the Northwest Federation of American Indians?*

Answer. *It is all of between 10 and 11 years ago since they became a member.*

Question. *Counsel asked you if your title is honorary. I will ask you if you have performed duties such as calling the tribe together and signing contracts with attorneys and appointing one of your members to take the enrollment, and such things as that?*

Answer. *Ever since I became recognized as the leader of the Snoqualmie Tribe, I always had the right and privilege to gather them so often, the same as I have them to-day.*

Question. *Have you called them together many times for council?*

Answer. *Yes.*

Question. *Do they come when you call them together?*

Answer. *Yes.*

Question. *What committees have the tribe now?*

Answer. *Wilfred Steve is one of the vice presidents of this council of this tribe; Jack Anderson, secretary; Johnny Johnson, treasurer; Bill Bagley is one of the committee; Ed Percival, committee; Joseph Charles, committee. That is all I can remember—Aleck Young, committee. That is all.*

Question. *Have you and your committee met with the chief or president of other tribes, with their committee, from time to time during the last 10 or 11 years, since you belonged to the federation?*

Answer. *Yes.*

* * * *

By the Commissioner:

Question. *Do you know of any other matter relative to the claim in question? If you do, state it.*

Answer. *The reason why I hear making these statements was because I was told direct from my uncle and others, the ones that was there when the treaty was made, and during my time, in the later days, that my uncles and all the other older people that gathered together and held a regular council and talked about this treaty, and I would be present and listen. Now, my uncle says to me, he says that "we want you to understand and know the fact that the Government has not fulfilled the promises that he made; he still owes for everything that he has promised. We will soon be passed away." For that reason I am looking forward and asking that something should be done to the promises that*

was made to the older people. He says all this country was ceded by the old chiefs with an understanding that they were to be paid in money, and he says and also the Government had promised that this big reservation and all you younger generation, that even the small children was to have allotment, and have homes for themselves. And also it was told to me that it was promised to them that they were going to establish and furnish us a school, and big schools, so that our children will be educated and learn the blacksmithing and mechanics of all other manual trainings. Now, he says all those promises isn't carried out to this present day. For that reason I said awhile back that I am stilling looking forward, and that is why we are filing the claim against the Government, for the Government failed in its part, and that is all I wanted to say.

He wishes to extend thanks to the Government man for coming over here to look over the conditions of our people and are very glad to see him come over and understand for himself the conditions of our surrounding.

[16]

It seems clear from the above, and from similar statements made by other deponents, that the Snoqualmie considered themselves to be an ongoing tribal organization pursuing matters of tribal business which had concerned previous tribal leaders and councils.

(9) In addition to the Court of Claims case referred to above, Jerry Kanim was frequently in Washington State

courts attempting to protect treaty hunting and fishing rights of the off-reservation Snoqualmie Tribe.

In a letter dated April 21, 1927 addressed to Mr. F.A. Gross, who was then in charge of the Tulalip Agency, Mr. Kanim wrote in part as follows:

I received your letter yesterday and I was in Seattle yesterday to my trial, but as the Judge was sick our case was postponed until next Wednesday April 27th.

And now, I will explain my trouble to you. I was doing a little trapping all winter. It is what I do every winter for my living. That is why I am in trouble. that is, for trapping without a license. there is three of us in for the same thing. Also we get arrested for taking fish out of the river, for our own use. This is all of our trouble.

The white man says that I'm breaking his law, taking my game and my fish. This is what I want to say. When my old people signed to give away our country to the United States Government. We didn't give away our game, or fish, berries or roots. And Governor Stevens agreed to that. * * * *

Pat Kanim was my Uncle. I'm representing the Snoqualmie Tribe now to-day. I have a set of treaty books here at my home. They were sent out from Washington, D.C. here to me. In Article 5 Volume 2 on Laws an treaties is says

"The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots an berries to open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

And friend I'm going to try to take this up in the Supreme Court if I can get to do it. All my people is getting to-gether in this point. So I'll have you to help us out all you can on this.

* * * *

And that is why I think that I can take fish an game

without a license at any time, because that was the understanding at the time the treaty was made, between the Whites and the Indians. We were supposed to take game an fish an berries at all time as long as the Mountain stands as long as the river is running. Now I will ask you my dear friend.

When did the State beat me out of these rights for game an fish? or did the Government turn over my rights to the State? And now the State is passing laws over these laws made by the United States Government and our old people. So this is the very point I want to get from you, is how did I lose my game, an fish an hunting rights at this time. The State law says I can take fish only inside the reservasion. Now how about us Indians outside of a reservasion an we are under the same treaty * * * *

[17]

The present Snoqualmie Tribal Organization, some of whose members are descendants and relatives of Jerry Kanim, continues to assert the same treaty rights which the off-reservation Snoqualmie have asserted since treaty times.

* * * *

(PP. 16-21)

EXHIBIT PL-M-3

WASHINGTON SALMON HARVEST STATISTICS
1974-1977,
TABLES 1 through 7

Table 1. ACTUAL HARVEST IN 1000's of Fish: Chinook Salmon

FISHERY	1974			1975			1976			1977			1974-1977 Average		
	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL
OCEAN															
TROLL (ALL)	385	-	385	262	12	274	343	18	361	251	12	263	310	10	320
SPORT (AREAS 1-4)	214	-	214	262	-	262	171	-	171	135	-	135	196	-	196
SUBTOTAL	599	-	599	524	12	536	514	18	532	386	12	398	506	10	516
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	119	72	191	182	141	323	152	137	289	183	84	267	159	108	267
FRESHWATER SPORT	16	-	16	16	-	16	18	-	18	7	-	7	14	-	14
SUBTOTAL	135	72	207	198	141	339	170	137	307	190	84	274	173	108	281
WILLAPA BAY															
NETS	14	-	14	15	-	15	29	-	29	24	-	24	20	-	20
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	14	-	14	15	-	15	29	-	29	24	-	24	20	-	20
GRAYS HARBOR															
NETS	10	1	11	7	2	9	8	4	12	12	6	18	9	3	12
FRESHWATER SPORT	1	-	1	1	-	1	1	-	1	1	-	1	1	-	1
SUBTOTAL	11	1	12	8	2	10	9	4	13	13	6	19	10	3	13
NORTH WASH. COAST															
NETS	-	11	11	-	12	12	-	11	11	-	17	17	-	13	13
FRESHWATER SPORT	-	-	-	-	1	1	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	11	11	-	12	13	-	11	11	-	17	17	-	13	13
PUGET SOUND AREAS 4B, 5, 6C, 6A, 7, 7A															
GILL NET	14	4	18	27	9	36	19	8	27	29	12	41	22	8	30
PURSE SEINE	38	-	38	62	1	63	43	2	45	47	3	50	48	2	50
REEF NET	1	-	1	2	-	2	-	-	-	1	-	1	1	-	1
SUBTOTAL	53	4	57	91	10	101	62	10	72	77	15	92	71	10	81
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	1	5	6	-	5	5	3	5	8	6	2	8	2	4	6
PURSE SEINE	1	-	1	-	-	-	1	4	5	2	-	2	1	1	2
SUBTOTAL	2	5	7	-	5	5	4	9	13	8	2	10	3	5	8
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	23	64	87	38	90	128	25	102	127	44	89	133	32	86	118
PURSE SEINE	2	-	2	1	1	2	-	3	3	-	5	5	1	2	3
OTHER	-	-	-	-	1	1	-	2	2	-	1	1	-	1	1
SUBTOTAL	25	64	89	39	92	131	25	107	132	44	95	139	33	89	122
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	255	-	255	334	-	334	307	-	307	205	-	205	276	-	276
FRESHWATER SPORT	3	-	3	3	-	3	5	-	5	5	-	5	4	-	4
SUBTOTAL	258	-	258	337	-	337	312	-	312	210	-	210	280	-	280
TOTAL	1,097	157	1,254	1,213	274	1,487	1,126	296	1,422	952	231	1,183	1,096	238	1,334

Table 2. ACTUAL HARVESTS IN 1,000's OF FISH: COHO SALMON

FISHERY	1974 NON-TREATY	1974 TREATY	1974 TOTAL	1975 NON-TREATY	1975 TREATY	1975 TOTAL	1976 NON-TREATY	1976 TREATY	1976 TOTAL	1977 NON-TREATY	1977 TREATY	1977 TOTAL	1974-1977 Average NON-TREATY	1974-1977 Average TREATY	1974-1977 Average TOTAL
OCEAN															
TROLL (ALL)	1,038	-	1,038	767	7	774	1,377	8	1,385	676	4	680	964	5	969
SPORT (AREAS 1-4)	595	-	595	481	-	481	943	-	943	412	-	412	608	-	608
SUBTOTAL	1,633	-	1,633	1,248	7	1,255	2,320	8	2,328	1,088	4	1,092	1,572	5	1,577
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	267	41	308	157	6	163	165	4	169	38	-	38	157	13	170
FRESHWATER SPORT	16	-	16	12	-	12	15	-	15	1	-	1	11	-	11
SUBTOTAL	283	41	324	169	6	175	180	4	184	39	-	39	168	13	181
WILLAPA BAY															
NETS	16	-	16	7	-	7	9	-	9	2	-	2	8	-	8
FRESHWATER SPORT	1	-	1	-	-	-	1	-	1	-	-	-	-	-	-
SUBTOTAL	17	-	17	7	-	7	10	-	10	2	-	2	8	-	8
GRAYS HARBOR															
NETS	50	5	55	21	4	25	14	19	33	1	3	4	22	8	30
FRESHWATER SPORT	4	-	4	1	-	1	3	-	3	-	-	-	2	-	2
SUBTOTAL	54	5	59	22	4	26	17	19	36	1	3	4	24	8	32
NORTH WASH. COAST															
NETS	-	61	61	-	24	24	-	25	25	-	9	9	-	30	30
FRESHWATER SPORT	1	-	1	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	1	61	62	-	24	24	-	25	25	-	9	9	-	30	30
PUGET SOUND AREAS 4B, 5, 6C, 6A, 7, 7A															
GILL NET	186	21	207	213	11	224	140	20	160	168	25	193	177	19	196
PURSE SEINE	195	-	195	158	1	159	199	16	215	114	7	121	166	6	172
REEF NET	16	-	16	7	-	7	3	-	7	4	-	4	8	-	8
SUBTOTAL	397	21	418	378	12	390	345	36	382	286	32	318	351	25	376
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	33	40	73	12	30	42	18	16	34	121	46	167	46	33	79
PURSE SEINE	39	-	39	-	6		6	9	15	77	17	94	30	-	30
SUBTOTAL	72	40	112	12	36	48	24	25	49	198	63	261	76	33	109
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	12	330	342	83	371	454	2	218	220	14	337	351	28	314	342
PURSE SEINE	14	-	14	77	5	82	1	3	4	19	-	19	28	2	30
OTHER															
SUBTOTAL	26	337	363	160	382	542	3	237	240	33	348	381	56	326	382
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	164	-	164	199	-	199	224	-	224	184	-	184	193	-	193
FRESHWATER SPORT	10	-	10	8	-	8	10	-	10	10	-	10	10	-	10
SUBTOTAL	174	-	174	207	-	207	234	-	234	194	-	194	203	-	203
TOTAL	2,657	505	3,162	2,203	471	2,674	3,134	354	3,488	1,841	459	2,300	2,458	440	2,898

Table 3. ACTUAL HARVEST IN 1000's OF FISH: SOCKEYE SALMON

FISHERY	1974 NON-TREATY	1974 TREATY	1974 TOTAL	1975 NON-TREATY	1975 TREATY	1975 TOTAL	1976 NON-TREATY	1976 TREATY	1976 TOTAL	1977 NON-TREATY	1977 TREATY	1977 TOTAL	1974-1977 Average NON-TREATY	1974-1977 Average TREATY	1974-1977 Average TOTAL
OCEAN															
TROLL (ALL)	-	-	-	1	-	1	1	-	1	-	-	-	-	-	-
SPORT (AREAS 1-4)	-	-	-	-	-	-	1	-	1	-	-	-	-	-	-
SUBTOTAL	-	-	-	1	-	1	1	-	1	-	-	-	-	-	-
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
WILLAPA BAY															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
GRAYS HARBOR															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NORTH WASH. COAST															
NETS	-	29	29	-	82	82	-	16	16	-	34	34	-	40	40
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	29	29	-	82	82	-	16	16	-	34	34	-	40	40
PUGET SOUND AREAS 4B, 5, 6C, 6A, 7, 7A															
GILL NET	852	30	882	615	39	654	547	77	624	613	228	841	657	94	751
PURSE SEINE	1,526	-	1,526	890	8	898	651	11	662	677	80	757	936	25	961
REEF NET	72	-	72	52	-	52	24	-	24	59	-	59	52	-	52
SUBTOTAL	2,450	30	2,480	1,557	47	1,604	1,222	88	1,310	1,349	308	1,657	1,645	119	1,764
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
PURSE SEINE	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	1	8	9	1	14	15	1	8	9	-	54	54	1	21	22
PURSE SEINE	1	-	1	-	-	-	-	2	2	-	1	1	-	-	-
OTHER	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	1	8	10	1	14	15	1	10	11	-	55	55	1	21	22
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	-	-	-	-	-	-	-	-	-	1	-	1	-	-	-
FRESHWATER SPORT	9	-	9	-	-	-	-	-	-	17	-	17	6	-	6
SUBTOTAL	9	-	9	-	-	-	-	-	-	18	-	18	6	-	6
TOTAL	2,460	67	2,527	1,558	143	1,701	1,223	114	1,337	1,367	397	1,764	1,652	180	1,832

Table 4. ACTUAL HARVEST IN 1000's OF FISH: PINK SALMON

FISHERY	1974 NON-TREATY	1974 TREATY[a]	1974 TOTAL	1975 NON-TREATY	1975 TREATY	1975 TOTAL	1976 NON-TREATY	1976 TREATY	1976 TOTAL	1977 NON-TREATY	1977 TREATY	1977 TOTAL	1974-1977 Average NON-TREATY	1974-1977 Average TREATY	1974-1977 Average TOTAL
OCEAN															
TROLL (ALL)	1	-	1	77	1	78	2	-	2	269	4	273	87	1	88
SPORT (AREAS 1-4)	-	-	-	14	-	14	-	-	-	27	-	27	10	-	10
SUBTOTAL	1	-	1	91	1	92	2	-	2	296	4	300	97	1	98
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
WILLAPA BAY															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
GRAYS HARBOR															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NORTH WASH. COAST															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
PUGET SOUND AREAS 4B, 5, 5A, 6, 6A, 7, 7A															
GILL NET	-	-	-	189	8	197	-	-	-	175	13	188	91	5	96
PURSE SEINE	-	-	-	973	7	980	-	-	-	1,587	139	1,726	640	36	676
REEF NET	-	-	-	59	-	59	-	-	-	22	-	22	20	-	20
SUBTOTAL	-	-	-	1,221	15	1,236	-	-	-	1,784	152	1,936	751	41	792
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	-	-	-	-	1	1	-	-	-	1	-	1	-	-	-
PURSE SEINE	-	-	-	-	4	4	-	-	-	-	-	-	-	1	1
SUBTOTAL	-	-	-	-	5	5	-	-	-	1	-	1	-	1	1
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	-	-	-	4	74	78	-	-	-	1	17	18	1	23	24
PURSE SEINE	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OTHER	-	-	-	-	-	-	-	-	-	-	6	6	-	2	2
SUBTOTAL	-	-	-	4	74	78	-	-	-	1	23	24	1	25	26
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	-	-	-	7	-	7	-	-	-	22	-	22	7	-	7
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	7	-	7	-	-	-	22	-	22	7	-	7
TOTAL	1	-	1	1,323	95	1,418	2	-	-	2,104	179	2,283	856	68	924

Table 5. ACTUAL HARVEST IN 1000's OF FISH: CHUM SALMON

FISHERY	1974 NON-TREATY	1974 TREATY	1974 TOTAL	1975 NON-TREATY	1975 TREATY	1975 TOTAL	1976 NON-TREATY	1976 TREATY	1976 TOTAL	1977 NON-TREATY	1977 TREATY	1977 TOTAL	1974-1977 Average NON-TREATY	1974-1977 Average TREATY	1974-1977 Average TOTAL
OCEAN															
TROLL (ALL)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SPORT (AREAS 1-4)	-	-	-	-	-	-	1	-	1	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	1	-	1	-	-	-	-	-	-
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	1	1	1	-	-	-	1	-	1	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	1	1	1	-	-	-	1	-	1	-	-	-	-	-	-
WILLAPA BAY															
NETS	36	-	36	23	-	23	33	-	33	7	-	7	25	-	25
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	36	-	36	23	-	23	33	-	33	7	-	7	25	-	25
GRAYS HARBOR															
NETS	29	-	29	10	3	13	13	11	24	1	1	2	13	4	17
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	29	-	29	10	3	13	13	11	24	1	1	2	13	4	17
NORTH WASH. COAST															
NETS	-	9	9	-	3	3	-	8	8	-	3	3	-	6	6
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	9	9	-	3	3	-	8	8	-	3	3	-	6	6
PUGET SOUND AREAS 4B, 5, 5A, 6, 6A, 7, 7A															
GILL NET	129	6	135	56	1	57	105	22	127	24	3	27	78	8	86
PURSE SEINE	68	-	68	36	-	36	138	14	152	28	2	30	68	4	72
REEF NET	3	-	3	1	-	1	3	-	3	2	-	2	2	-	2
SUBTOTAL	200	6	206	93	1	94	246	36	282	54	5	59	148	12	160
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	6	42	48	3	11	14	160	24	184	140	23	163	77	25	102
PURSE SEINE	21	-	21	1	2	3	36	22	58	45	2	47	26	6	32
SUBTOTAL	27	42	69	4	13	17	196	46	242	185	25	210	103	31	134
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	3	109	112	3	47	50	11	218	229	12	97	109	7	118	125
PURSE SEINE	-	-	-	3	1	4	25	3	28	1	1	2	7	1	8
OTHER	-	-	-	-	-	-	-	3	3	-	-	-	-	-	-
SUBTOTAL	3	109	112	6	48	54	36	224	260	13	98	111	14	119	133
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	3	-	3	-	-	-	2	-	2	1	-	1	2	-	2
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	3	-	3	-	-	-	2	-	2	1	-	1	2	-	2
TOTAL	299	166	465	136	68	204	526	325	851	261	123	384	305	172	477

Table 6. ACTUAL HARVESTS IN 1,000's OF FISH: 1974-77 AVERAGES FOR ALL SPECIES

FISHERY	CHINOOK			COHO			SOCKEYE			PINK			CHUM		
	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL
OCEAN															
TROLL (ALL)	310	10	320	964	5	969	-	-	-	87	1	88	-	-	-
SPORT (AREAS 1-4)	196	-	196	608	-	608	-	-	-	10	-	10	-	-	-
SUBTOTAL	506	10	516	1,572	5	1,577	-	-	-	97	1	98	-	-	-
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	159	108	267	157	13	170	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	14	-	14	11	-	11	-	-	-	-	-	-	-	-	-
SUBTOTAL	173	108	281	168	13	181	-	-	-	-	-	-	-	-	-
WILLAPA BAY															
NETS	20	-	20	8	-	8	-	-	-	-	-	-	25	-	25
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	20	-	20	8	-	8	-	-	-	-	-	-	25	-	25
GRAYS HARBOR															
NETS	9	3	12	22	8	30	-	-	-	-	-	-	13	4	17
FRESHWATER SPORT	1	-	1	2	-	2	-	-	-	-	-	-	-	-	-
SUBTOTAL	10	3	13	24	8	32	-	-	-	-	-	-	13	4	17
NORTH WASH. COAST															
NETS	-	13	13	-	30	30	-	40	40	-	-	-	-	6	6
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	13	13	-	30	30	-	40	40	-	-	-	-	6	6
PUGET SOUND AREAS 4B, 5, 6C, 6A, 7, 7A															
GILL NET	22	8	30	177	19	196	657	94	751	91	5	96	78	8	86
PURSE SEINE	48	2	50	166	6	172	936	25	961	640	36	676	68	4	72
REEF NET	1	-	1	8	-	8	52	-	52	20	-	20	2	-	2
SUBTOTAL	71	10	81	351	25	376	1,645	119	1,764	751	41	792	148	12	160
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	2	4	6	46	33	79	-	-	-	-	-	-	77	25	102
PURSE SEINE	1	1	2	30	-	30	-	-	-	-	1	1	26	6	32
SUBTOTAL	3	5	8	76	33	109	-	-	-	-	1	1	103	31	134
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	32	86	118	28	314	342	1	21	22	1	23	24	7	118	125
PURSE SEINE	1	2	3	28	2	30	-	-	-	-	-	-	7	1	8
OTHER	-	1	1	-	10	10	-	-	-	-	2	2	-	-	-
SUBTOTAL	33	89	122	56	326	382	1	21	22	1	25	26	14	119	133
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	276	-	276	193	-	193	-	-	-	7	-	7	2	-	2
FRESHWATER SPORT	4	-	4	10	-	10	6	-	6	-	-	-	-	-	-
SUBTOTAL	280	-	280	203	-	203	6	-	6	7	-	7	2	-	2
TOTAL	1,096	238	1,334	2,458	440	2,898	1,652	180	1,832	856	68	924	305	172	477

Table 7. HARVESTS IN 1,000's OF FISH ADJUSTED TO ADULT EQUIVALENTS ON STOCKS WITH TREATY FISHING RIGHTS: 1974-77 AVERAGES FOR ALL SPECIES

FISHERY	CHINOOK			COHO			SOCKEYE			PINK			PINK		
	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL
OCEAN															
TROLL (ALL)	121	4	125	280	1	281	-	-	-	61	-	61	-	-	-
SPORT (AREAS 1-4)	76	-	76	128	-	128	-	-	-	7	-	7	-	-	-
SUBTOTAL	197	4	201	408	1	409	-	-	-	68	-	68	-	-	-
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	67	108	175	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	67	108	175	-	-	-	-	-	-	-	-	-	-	-	-
WILLAPA BAY															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
GRAYS HARBOR															
NETS	9	3	12	22	8	30	-	-	-	-	-	-	13	4	17
FRESHWATER SPORT	1	-	1	2	-	2	-	-	-	-	-	-	-	-	-
SUBTOTAL	10	3	13	24	8	32	-	-	-	-	-	-	13	4	17
NORTH WASH. COAST															
NETS	-	13	13	-	30	30	-	40	40	-	-	-	-	6	6
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	13	13	-	30	30	-	40	40	-	-	-	-	6	6
PUGET SOUND AREAS 4B, 5, 6C, 6A, 7, 7A															
GILL NET	22	8	30	177	19	196	657	94	751	91	5	96	78	8	86
PURSE SEINE	48	2	50	166	6	172	936	25	961	640	36	676	68	4	72
REEF NET	1	-	1	8	-	8	52	-	52	20	-	20	2	-	2
SUBTOTAL	71	10	81	351	25	376	1,645	119	1,764	751	41	792	148	12	160
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	2	4	6	46	33	79	-	-	-	-	-	-	77	25	102
PURSE SEINE	1	1	2	30	-	30	-	-	-	-	1	1	26	6	32
SUBTOTAL	3	5	8	76	33	109	-	-	-	-	1	1	103	31	134
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	32	86	118	28	314	342	1	21	22	1	23	24	7	108	115
PURSE SEINE	1	2	3	28	2	30	-	-	-	-	-	-	7	1	8
OTHER	-	1	1	-	10	10	-	-	-	-	2	2	-	-	-
SUBTOTAL	33	89	122	56	326	382	1	21	22	1	25	26	14	109	123
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	83	-	83	135	-	135	-	-	-	6	-	6	2	-	2
FRESHWATER SPORT	4	-	4	10	-	10	6	-	6	-	-	-	-	-	-
SUBTOTAL	87	-	87	145	-	145	6	-	6	6	-	6	2	-	2
TOTAL	468	232	700	1,060	423	1,483	1,652	180	1,832	826	67	893	280	162	442